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Abstract

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Keywords

Constitutional law; Judicial review; Canada

CONSTITUTIONAL ARGUMENTS: INTERPRETATION AND LEGITIMACY IN CANADIAN CONSTITUTIONAL THOUGHT©

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The author provides an analysis and critique of the various types of arguments advanced by Canadian constitutional jurists to establish formal grounds for the legitimacy of judicial review under the Canadian constitution. He demonstrates how two variables – constitutional truth and trust in the judiciary – are relied upon in past and contemporary debates about constitutional adjudication to construct four different types of argument about the legitimacy of judicial review. Each of these types of argument is then criticized in the context of recent *Charter* decisions. It is argued that none of them can sustain the burden of legitimating judicial review.

This paper will analyze and criticize the various types of arguments advanced by Canadian constitutional jurists to establish formal grounds for the legitimacy of judicial review under Canada's constitution.[1] Judicial review requires judges to determine the legal

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[1] Arguments that attempt to establish formal grounds of legitimacy have two basic characteristics. First, they seek to provide reasons, other than the threat of coercion, why people should comply with the dictates of the institution on behalf of which the argument is made. Second, the reasons are formal : they do not appeal to the substantive merits of particular decisions but, rather, to formal principles prescribing the correct processes and methods of decision-making. Arguments about the legitimacy of judicial review generally relate to *how* judges should decide constitutional cases, not *what* they should decide. Thus,

validity of actions by the political institutions – the legislature and executive – of the state.[2] The usual principles advanced in a Parliamentary democracy to legitimate the exercise of political power are not available for judicial review. They are, indeed, challenged by the practice: judges, who are neither responsible to nor representative of the electorate, scrutinize the power of institutions that are thought to be both. Constitutional jurisprudence and scholarship are concerned to a large degree with constructing arguments aimed at mediating the apparent conflict between judicial review and the principles of Parliamentary democracy.

Two structures of mediation are relied upon in Canadian constitutional discourse. First, one finds the argument that judges are constrained by the constitution to reach legally correct answers to particular constitutional questions. They do not, therefore, substitute their policy choices and preferences for those of elected officials. Such arguments acknowledge that when judges make decisions under the constitution, they exercise power – they use the power of the court, and therefore the state, to condone or rearrange existing social and legal relations – but they portray the exercise of such power as legitimate because it is required by the constitution. Legitimacy thus depends on the plausibility of a unique link between

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legitimation arguments normally take the form of theories of interpretation. A theory of interpretation is one which "attempt[s] to govern interpretations of particular texts by appealing to an account of interpretation in general:" S. Knapp & W.B. Michaels "Against Theory" in W.J.T. Mitchell, ed., *Against Theory* (Chicago: University of Chicago Press, 1985) at 11. See also S. Fish, "Consequences" in *Against Theory*, *ibid* at 106-08.

For discussions of the concept of legitimation see: D. Hay, "Property, Authority and the Criminal Law," in D. Hay *et al.* eds, *Albion's Fatal Tree* (London: Pantheon Books, 1975); A. Hyde, "The Concept of Legitimation in the Sociology of Law" (1983) Wisconsin L. Rev. 379; A. Przeworski, *Capitalism and Social Democracy* (Cambridge: Cambridge University Press, 1987); J. Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1973); M. Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987) and W. Connolly, *Legitimacy and the State* (New York: New York University Press, 1984). For a discussion of the substantive "visions" associated with formal legal arguments, see: D. Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv. L. Rev. 1685.

[2] The judiciary is, of course, a political institution of the state as well. The problem of legitimacy in the context of judicial review of judicial power does not, however, raise the "counter-majoritarian" difficulties encountered when attempting to legitimate judicial review of elected bodies. In any event, the problem of judicial review of judicial power is moot since the Supreme Court of Canada's decision that the judiciary is not a branch of government and is, therefore, not subject to the *Charter*: see *Dolphin Delivery* v. *R.W.D.S.U.* (1986), 33 D.L.R. (4th) 174 (S.C.C.).

the constitutional prescription in question and the result rendered by the Court in its name. The difficulty with this type of argument is that most of the provisions of the constitutional text are couched in language so general as to allow for multiple plausible meanings. A definition of a concept like "liberty," "equality," "freedom of expression," or "property and civil rights" may attract unanimous assent when articulated at a high level of abstraction, but this unanimity quickly fractures as the concept is defined in more and more particular terms. While in theory judges must be constrained by the concepts prescribed by the constitution in reaching their decisions, constraint is problematic in practice because of the indeterminacy of constitutional language. Those who rely on constraint-based constitutional arguments address this problem by constructing interpretive methodologies to resolve the ambiguities of constitutional prescriptions and thus determine their *true* meanings.

The second type of argument relied upon to mediate the apparent conflict between judicial review and democratic principles contrasts sharply with the first. According to this argument, judicial review *necessarily* involves the judiciary in discretionary decision-making. The empirical premise of the first argument — that judges *can* be constrained by the constitution to reach particular decisions — is rejected. The constitution is understood as providing only vague and general standards which may structure the adjudicative process but cannot determine unique and uncontroversial solutions to constitutional disputes. Thus, constitutional decisions are based on judicial choice and discretion. Judges, like other policy-makers, must balance competing interests and consider the probable consequences of deciding one way or the other. Judicial review is considered legitimate within this understanding of the practice on the ground that judges can be trusted, because of their personal qualities and institutional role, to balance competing interests impartially and reasonably. The notion of trust as a basis for legitimacy is manifest in modes of judicial reasoning that emphasize judicial discretion and choice exercised in accordance with vague and indeterminate standards in other areas of law. Equitable jurisdictions and doctrines like unconscionability are examples in private law. In such areas, as in constitutional law, the alleged professionalism, impartiality, moral acumen, and general sense of fairness and decency of those who hold judicial office are implicitly or explicitly relied upon as grounds

for the legitimacy of judicial results. Judges are understood as experts in the art of interest balancing. This approach rejects abstract and general reasoning, deduction from allegedly determinate norms, conceptualization, adherence to precedent, and the other trappings of the style of legal reasoning premised on the need to constrain judicial choice and discretion. These are understood by advocates of the trust approach as impediments to, not requirements of, rational and honest legal reasoning.

The following discussion will demonstrate how the two types of legitimation argument – the one based on *constraint* by the constitution, the other on *trust* in judicial interest balancing – structure constitutional argument in Canadian legal discourse. In Part I, I will examine the development of these two types of argument by pre-Charter constitutional scholars in reaction to the narrow and technical interpretive style of the Judicial Committee of the Privy Council in Canadian constitutional cases. This will set the stage for the following parts. In these, I will concentrate primarily on attempts to legitimate judicial review under the *Canadian Charter of Rights and Freedoms*. Part II will examine and criticize the predominant style of *constraint-based* reasoning developed and applied by the Supreme Court of Canada in *Charter* adjudication, namely, purposive interpretation and a legalistic section 1 analysis. My critique will emphasize that this style of reasoning does not meet the criterion of legitimacy that underlies it. It does not make determinate the indeterminate provisions of the constitutional text, and cannot therefore be relied upon to support the view that constitutional decisions are the products of constitutional constraints. Part III will analyze *trust-based* arguments in the Supreme Court's *Charter* adjudication. Here I will suggest there are insufficient grounds for trusting judicial value choices and discretion and accordingly that trust is not a plausible formal ground for legitimacy. In Part IV, I will examine critically the argument often understood as following from the insufficiency of constraint and trust as formal grounds of legitimacy, namely, that the only legitimate response of the Court in constitutional cases is judicial restraint. Finally, Part V will look at the argument, made by many contemporary constitutional scholars, that constitutional decision-making is constrained and objective even though there are not always constitutionally determined answers to constitutional questions. This argument

attempts to establish and defend a middle ground between the *constraint-based* view that a constitutionally correct answer exists for every constitutional question, and the *trust-based* view that constitutional interpretation is inevitably discretionary and result oriented. I will argue that the middle ground only compounds the difficulties concerning legitimacy encountered in the other approaches.

I.

The legitimacy of judicial review under the Constitution has been a problem in Canadian legal thought for more than a century. Soon after the Judicial Committee of the Privy Council handed down its first decisions under the *British North America Act, 1867*, a rather heated debate developed in Canadian law journals on the propriety of relying on an elite group of British judges to shape the Canadian constitution. The debate was focused more closely on the legitimacy of the Privy Council than on the legitimacy of judicial review *per se*. Nonetheless, it was the beginning of a critical voice in Canadian constitutional thought and provides a useful background for understanding later developments.

Critics of the Judicial Committee in the late nineteenth and early twentieth century had a number of complaints.[3] First, they argued that the reasoning of the Judicial Committee, particularly in its constitutional opinions, was confusing and conflictual.[4] Second, they pointed out that having a "foreign" tribunal as the highest court of appeal for Canadian cases was an affront to the dignity of Canada and Canadians.[5] Third and fourth, the Judicial Committee was

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[3] See generally A. Galt, "Appeals to the Privy Council" (1921) 41 Can. L.T. 168; A. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. J. Pol. Sci. 301; and J. Snell & F. Vaughan, *The Supreme Court of Canada* (Toronto: The Osgoode Society, 1985) at 189-91.

[4] Editorial, "The Privy Council Decisions" (1894) 14 Can. L.T. 323 and Editorial, "The Judicial Committee of the Privy Council" (1894) 14 Can. L.T. 164.

[5] W.S. Deacon, "Canadians and The Privy Council" (1911) 31 Can. L.T. 6 and 123.

thought to be biased in favour of corporations[6] and provincial powers[7] respectively. Fifth, appeals to the Judicial Committee were considered to be "in the interest of the moneyed classes and inimical to the masses" because "outside of corporations and rich people" nobody could afford to cross the Atlantic with their appeals.[8] Sixth, members of the Judicial Committee were thought to be ignorant of political, social and economic conditions in Canada.[9]

Defenders of the Judicial Committee emphasized the weaknesses of the Supreme Court of Canada, and insisted that "the assertion that there is any inconsistency to be found in the decisions of [the Judicial Committee] is without any warrant whatsoever."[10] The fact that the Judicial Committee was not in Canada was understood as an advantage. "Being far removed from the cause of litigation, their judgements are not affected or tainted with local spirit or prejudice."[11] Finally, in contrast to the nationalism of the critics, the defenders of the Judicial Committee argued for the importance of continuing appeals so as to maintain links with the United Kingdom. One commentator characterized the critics of the Judicial Committee as "furiosant fanatics, ... dissensionists and disintegrators, [who] abhor the notion that Canada is dependent for anything on the United Kingdom, even the right interpretation of its Constitution and Laws."[12]

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[6] *Ibid.* For a review of newspaper editorials in the early twentieth century supporting the position that the Judicial Committee was pro-business, see: Editorial, "Shall We Stop Appealing to the Privy Council" (1912) 32 Can. L.T. 804.

[7] This theme became quite pronounced during the 1930's as we shall see below. For an early example of this type of critique, see G. Rae, "Some Constitutional Opinions of the Late Mr. Justice Gwynne" (1904) 24 Can. L.T. 1, at 12-15. See, also, A. Cairns, *supra*, note 3.

[8] W.S. Deacon, *supra*, note 5, at 128.

[9] T. Hodgins, "The Judicial Committee of the Privy Council and Colonial Judges" (1895) 15 Can. L.T. 133.

[10] Editorial, "The Judicial Committee of the Privy Council" (1894) 30 Can. L.J. 294 at 296.

[11] W. Nesbitt, "The Judicial Committee of the Privy Council" (1909) 29 Can. L.T. 241 at 249; J. Small "Supreme Court and Privy Council Appeals" 29 Can. L.T. 47; Editorial, (1891) 27 Can. L.J. 33 and Editorial, "Our Court of Final Appeal" (1912) 48 Can. L.J. 205.

[12] Editorial, "Privy Council Appeals" (1921) 41 Can. L.T. 161 at 162.

Despite such petulant reactions, Canadian constitutional jurists continued to criticize the work of the Judicial Committee under the *British North America Act, 1867*. In giving effect to the provisions of that *Act*, the Judicial Committee had frustrated many of the legislative programs of the federal government, and by the middle of the 1930s charges of provincial bias and anti-regulatory sentiment were regularly levelled by eminent Canadian jurists. These jurists alleged the Judicial Committee was importing to Canada its own distorted image of the Canadian constitution and doing so behind a facade of narrow and technical interpretation. The legitimacy of its decisions striking down various legislative initiatives was no longer taken for granted. Legitimacy became a problem rather than a premise, and critical analyses of the Judicial Committee's interpretive methods occupied the leading constitutional jurists of the day.[13]

Throughout its tenure as the final court of appeal for Canadian constitutional cases,[14] the Judicial Committee approached constitutional adjudication as a technical and legalistic exercise, reasoning in its decisions as though the broad concepts elaborated in the text of the *B.N.A. Act, 1867* could determine particular meanings and results through deductive analysis of the constitutional text and doctrine. While the Judicial Committee acknowledged that ambiguous phrases required resort to various techniques and rules of statutory construction as well as consideration of the textual context in which the phrases were situated, it assumed determinate meaning could always be found within the four corners of the text. The *B.N.A. Act* was to be treated "by the same methods of construction and exposition which [courts] apply to other statutes."[15] "[I]f the text is explicit the text is conclusive.... [W]hen the text is

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[13] See Cairns, *supra*, note 3.

[14] Appeals to the Judicial Committee of the Privy Council in constitutional cases were abolished in 1949.

[15] *Lambe's Case* (1887), 12 App. Cas. 575 (P.C.) at 579. See V. MacDonald, "The Constitution in a Changing World" (1948) 26 Can. Bar Rev. 21 at 31; W.H.P. Clement, *The Law of the Canadian Constitution*, 3d ed. (Toronto: Carswell, 1916) at 472-92; A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book and Publishing Company, 1897) at 21-40 and W.P.M. Kennedy, *Some Aspects of the Theories and Workings of Constitutional Law* (New York: MacMillan, 1932) at 71-95.

ambiguous ... recourse must be had to the context and scheme of the Act."[16] Underlying this approach to interpretation was the presumption that the judges of the Judicial Committee were constrained by the text of the *B.N.A. Act, 1867*, and therefore *required* by the *Act* to reach the results they did. At least in theory then, the intervention of judicial choice and discretion was avoided.[17]

The Judicial Committee's interpretive methodology attracted two types of criticism. Alan Cairns has characterized these as "fundamentalist" and "constitutionalist."[18] The fundamentalists believed the original intention of the constitutional framers was to establish a centralized federal system. This intent was, according to the fundamentalists, embodied in the B.N.A. Act and evident in the materials surrounding its inception. The fault of the Judicial Committee was its radical deviation from the purposes and intentions of the constitutional framers. Constitutionalists, on the other hand, "asserted that the Judicial Committee should have been an agent for constitutional flexibility, concerned with the policy consequences of their decisions."[19] Accordingly they called for liberal and flexible interpretation, open acknowledgement of the policy role of judges, and consideration of social and economic facts in constitutional adjudication. The two modes of critique identified by Cairns correspond to the two types of legitimation argument elaborated earlier. The fundamentalist critique attacked the legitimacy of the

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[16] *A.-G. Ontario* v. *A.-G. Canada* (1911), [1912] A.C. 571 (P.C.) at 583. See MacDonald, *ibid.*; Clement, *ibid.*; Le Froy, *ibid*; Kennedy, *ibid.*

[17] See, for a classic example of this type of reasoning, *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96. The question was whether insurance contracts fell within the provincial power to regulate "property and civil rights in the province," or the federal power to regulate "trade and commerce." The complainant had alleged that a provincial Act regulating insurance was invalid. The Judicial Committee disagreed. First, it argued that, on a proper construction of the words "property and civil rights," there was "no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision." *Ibid.* at 110-11. Second, the Judicial Committee argued, the words "trade and commerce" could not be construed to include insurance contracts. While the words themselves were "sufficiently wide ... to include every regulation of trade," their meaning was "[controlled] by [their] context and other parts of the Act," and "[they did] not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province...." *Ibid.* at 113.

[18] *Supra*, note 3 at 302.

[19] *Ibid.* at 307.

constitutional decisions of the Judicial Committee on the ground they were based on interpretations that were contrary to the *true* meaning of the constitution. According to this critique, the judges of the Judicial Committee were substituting their views (and biases) in place of the allegedly uncontroversial requirements of the constitution. Implied in the critique was an understanding of the legitimacy of judicial outcomes that required they be *determined* by constitutional norms. Judges were not to function as policy-makers, but rather as humble servants of constitutional law and the purposes and intentions underlying it. The constitutionalist critique rested upon a very different assumption about legitimacy, one that emphasized *trust* in judicial policy-making rather than constraint by constitutional "truths." The judge was understood and trusted as an enlightened policy-maker, whose job was to keep the constitution current with the changing times through careful consideration of the social and economic consequences of decisions. The judge's role was not to posture as a mechanical administrator of allegedly determinate constitutional norms.

The two types of critique, with their different assumptions about the legitimacy of judicial review, are manifest in the critical constitutional scholarship of the 1930s. They are well illustrated in a collection of articles, written by three of Canada's most respected constitutional scholars – Vincent MacDonald, W.P.M. Kennedy, and F.R. Scott[20] – in response to the Judicial Committee's decisions of 1937 striking down the Federal government's "New Deal" legislative program.[21] In each of these articles the respective author developed both "fundamentalist" and "constitutionalist" types of arguments to criticize the decisions of the Judicial Committee.

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[20] V. MacDonald, "The Canadian Constitution Seventy Years After" (1937) 15 Can. Bar Rev. 401; W.P.M. Kennedy, "The British North America Act: Past and Future" (1937) 15 Can. Bar Rev. 393; and F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485.

[21] *Supra*, note 3 at 325-27. The "New Deal" cases are *Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act*, [1937] 1 D.L.R. 673 (P.C.); *Reference Re Employment and Social Insurance Act*, [1937] 1 D.L.R. 684 (P.C.); *Reference Re Natural Products Marketing Act*, [1937] 1 D.L.R. 691 (P.C.); *Reference Re Farmers' Creditors Arrangement Act 1934*, [1937] 1 D.L.R. 695 (P.C.) and *Reference Re Dominion Trade and Industry Commission Act 1935*, [1937] 1 D.L.R. 702 (P.C).

The "fundamentalist" argument is evident in the critics' insistence that in the "New Deal" cases the Judicial Committee had misinterpreted the constitution, and substituted its own pro-provincial predilections for the constraints of the constitution. F.R. Scott, for example, noted that the pro-provincial bias of the Privy Council undoubtedly "had the effect of giving us a constitution exactly the opposite, in one vital respect, of that which we actually adopted in 1867."[22] In his view, the decisions of the Privy Council in the New Deal cases were nothing short of a "constitutional revolution ... a striking example of judicial legislation."[23] Similarly, Kennedy argued that the decisions had frustrated the centralist intentions of the founders of Canada,[24] and MacDonald was sure the decisions depicted "a constitution of a character the complete reverse of that intended; for the result is a decentralized federalism with the effective residue of legislative power in the province."[25] Implicit in the arguments advanced by each author was the view that the legitimacy of the outcomes in the "New Deal" decisions was seriously compromised by the Judicial Committee's unwillingness to be constrained by the *true* purposes of the Constitution – namely, strong centralism.[26]

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[22] F.R. Scott, *supra*, note 20 at 488.

[23] *Ibid.* at 488-89.

[24] W.P.M. Kennedy, *supra*, note 20 at 400.

[25] V. Macdonald, *supra*, note 20 at 424.

[26] The tenor of the critique is captured by E. McWhinney in the following comments:

> My criticisms have been directed specifically to the failure of the Privy Council frankly to acknowledge and admit, in its formal opinions accompanying its decisions, that it was engaging in constitutional elaborations that were neither expressly warranted by the text of the Constitution, nor supported by the original historical intentions of the Founding Fathers of the Constitution, in reaching the results that the Privy Council did, in the period from 1896 onwards, in relation to social and economic planning legislation and Dominion-Provincial relations generally. The judicial policy-maker surely has certain obligations of public candour, in order to expose the judicial policy choices to the democratic corrective of public discussion and criticism! The failure of the Privy Council, in relation to the Canadian Constitution, to be frank and explicit as to the policy bases of its opinions, meant that the reasons for the actual policy choices too often remained obscured and concealed, with the policy considerations necessarily operating then as "inarticulate major premises" to the final decision.

A very different concern about the legitimacy of the "New Deal" decisions is implicit in the "constitutionalist" strand in the articles by Scott, Kennedy, and MacDonald. From the constitutionalist perspective, the failure of the Judicial Committee was its adherence to narrow and technical reasoning and its unwillingness to consider openly the probable policy consequences of deciding constitutional disputes one way or the other. W.P.M. Kennedy, for example, complained that by interpreting the constitution "precisely as framed," the Judicial Committee had failed to consider important "questions of expediency or of political exigency."[27] Similarly, Vincent MacDonald adopted S.E. Smith's observation that the Judicial Committee's decisions did not display "any burning anxiety to make ... [the] constitution ... fit contemporary needs."[28] According to him, while "purely legal interpretation" might have been fitting in other areas of law, in constitutional law "interpretation [turned] on consideration of policy ... to a large degree,"[29] and should not seek to avoid policy considerations.

Having acknowledged the need for more open policy-making in constitutional adjudication, however, the critics had to once again emphasize the deficiencies of the Judicial Committee's constitutional jurisdiction. There was little reason to *trust* a body located across the Atlantic and staffed by British Law Lords to make important policy decisions for Canada. While all of the critics believed the constitution should be kept flexible, able to adapt to a growing and changing society, this only strengthened their resolve that constitutional appeals to the Judicial Committee should be abolished. They argued that the Judicial Committee was not in touch with contemporary Canadian needs and concerns and could not rationally make the important policy decisions required in constitutional adjudication even if it were willing to abandon its legalistic interpretive style. The Judicial Committee was, therefore,

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Judicial Review in the English Speaking World, 3d ed. (Toronto: University of Toronto Press, 1965) at 223-24.

[27] W.P.M. Kennedy, *supra*, note 20 at 393.

[28] *Ibid.* at 425, note 46.

[29] *Ibid.* at 426.

considered by its critics to be an inappropriate body for deciding Canadian constitutional cases.

The themes of constraint and trust continued to inform the work of critical constitutional scholars through the 1940s and 1950s. Like Scott, MacDonald, and Kennedy, the scholars of this era believed constitutional law was different than other types of law because of its close connection to the most important political, social and economic issues of the day. As well, they embraced the view that narrow and legalistic interpretation in constitutional adjudication functioned to mask judicial bias. The three scholars of this era upon whom I will focus – Laskin, Friedmann, and LaBrie – did not agree among themselves on the appropriate solution to the problem they identified. Friedmann and LaBrie believed *constraint* of judicial choice and discretion was essential for the legitimacy of judicial review. According to them, while the constitutional text and doctrine could not alone provide such constraint, the purposes and principles underlying the constitution could and should have been relied upon to constrain judicial decision-making. Laskin, on the other hand, appears to have believed that constraint on judicial choice and discretion was neither possible nor desirable and rested his case for legitimacy on *trust* in judicial sensibility.

Before looking at their differences, I would like to examine the view that all three scholars shared, namely, that constitutional adjudication was political in spite of the facade of legalism constructed by the Judicial Committee. Laskin argued that the text of the B.N.A. Act and doctrine developed under it could not constrain judicial choice and discretion in constitutional cases. Constitutional adjudication inevitably required choice "according to social and economic preferences" and such choice was merely "concealed in constitutional interpretation," rather than avoided by it.[30] For example, an examination of the cases relating to the "peace, order and good government clause," did not, for Laskin, "indicate any inevitability in the making of particular decisions; if anything, it indicate[d] conscious and deliberate choice of a policy which required, for its advancement, manipulations which [could]

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[30] B. Laskin, "Tests for the Validity of Legislation: What's the 'Matter'?" (1955) 11 U.T.L.J. 114 at 126.

only with difficulty be represented as ordinary judicial techniques."[31] According to Laskin:

> The time has surely come in the history of our constitutional law to recognize the conscious role that courts and judges have played in shaping federal and provincial power and thereby controlling governmental policies.... We may as well deny the existence of the court as to deny that judicial decisions are the products of social and economic and political considerations for which the words of the British North America Act are merely the vehicles of communication. The constitution is as open as the minds of those called upon to interpret it; it is as closed as their minds are closed.[32]

On the basis of text and doctrine alone, most constitutional cases "could just as well have been decided the other way."[33]

Friedmann noted that there were "two opposing view points"[34] of adjudication. The first was "the more widely accepted by bench and bar in Canada"[35] and required the judge "to ignore political and social issues"[36] and to decide disputes on "technical legal grounds."[37] On this view, all statutes were to be "interpreted strictly, according to rules laid down in text books and precedents on statutory interpretation."[38] This first view describes, as we have seen, the dominant approach to constitutional interpretation of the Judicial Committee. The opposing view, which Friedmann endorsed "though

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[31] B. Laskin, "Peace, Order and Good Government Re-Examined" (1947) 25 Can. Bar. Rev. 1054 at 1086. In making this claim Laskin was attempting to refute the view that the results reached by the Privy Council was the consequence of its choice to interpret the constitution as a statute rather than a constitution. His point was that the policy choice was first made, and it was then followed by attempts at justification through invocation of statutory techniques. He had read the critics of the 1930's as seeing it the other way around. The critics of the 1930's were not always clear on this point, though I believe the view expressed by Laskin that politics preceded reasoning was implied in their critiques. See, also, McWhinney, *supra*, note 26 at 68-69.

[32] *Supra*, note 30 at 127.

[33] *Ibid.* at 124.

[34] W. Friedmann, "Judges, Politics and the Law" (1951) 29 Can. Bar Rev. 811 at 812.

[35] *Ibid.*

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.*

not without some reservations,"[39] rejected as a "delusion" the first view's "unpolitical treatment of predominately political and social issues clothed in legal form." According to Friedmann, the first view "usually [meant] the application of a thinly masked political philosophy of the court, opposed to that of the legislator."[40] The *B.N.A. Act* was, in his view, an "eminently political and general"[41] statute, a "document of a political [and] social character."[42] Its interpretation was a political activity, "as political as that of the American Constitution by the Supreme Court of the United States, and as far reaching in its social consequences."[43]

LaBrie, like Friedmann, noted there were "two points of view" about constitutional interpretation: "According to the first view, constitutional interpretation is a strictly judicial process exercisable within fixed rules of law. According to the other, constitutional interpretation exists as a legislative process, exercisable on a discretionary basis...."[44] LaBrie believed the latter of these views accurately described the constitutional work of the Judicial Committee and Supreme Court of Canada.[45] After a detailed review of Canadian constitutional decisions and doctrine on legislative validity, he noted "the very wide degree of judicial discretion"[46]

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[39] *Ibid.* at 813.

[40] *Ibid.* at 812. See also Willis, *Correspondence* (1951) 29 Can. Bar Rev. 572 at 580.

[41] *Ibid.* at 827. Common law adjudication was also in the latter camp according to Friedmann. In common law adjudication it was impossible to maintain a distinction "between the making of the law – which is the legislator's field – and the application of the law, which is the judge's field." *Ibid.* at 819.

[42] *Ibid.* at 828.

[43] *Ibid.* at 827-28.

[44] La Brie, "Canadian Constitutional Interpretation and Legislative Review" (1949) 8 U.T.L.J. 298 at 298.

[45] According to him, the latter view had "always remained officially undeclared and undisclosed." It could, however, be "perceived through the unsatisfactory logic of the judicial decisions, the indecisive nature of the established rules for constitutional interpretation and the inadequacy of the guidance to legislative validity afforded by previous decisions when new legislation in answer to the problems created by social change is challenged as unconstitutional." *Ibid.*

[46] *Ibid.* at 340.

exercised "behind the façade of statutory interpretation."[47] According to him, "it is by no means certain that judges are not affected in their choice of proper legislative aspect by the fact that they may like or dislike legislation."[48] Judicial choices and discretion in constitutional cases were based on a judge's view of the "wisdom" of the legislation – on its "social and economic consequences" – about which "there may exist much differences of opinion."[49]

As noted earlier, Friedmann and LaBrie reached significantly different conclusions than Laskin on the appropriate response to the fact that constitutional adjudication was "eminently political." Friedmann and LaBrie, having rejected the possibility that constitutional decision-making could be constrained through narrow and legalistic interpretation, nonetheless believed constraint to be a necessary condition of legitimacy. Neither author was sympathetic to judicial policy-making. Indeed, Friedman praised the post-*Lochner* Court in the United States for having "abandoned the distortion of the democratic process which followed from the all too successful attempt of its predecessors to sit in judgement over the policies of the legislator."[50] Both Friedmann and LaBrie turned to "purposive reasoning" as a source of constraint on judicial choice and discretion in constitutional cases. They believed that, while narrow and legalistic reasoning was insufficient to constrain judicial discretion and thus avoid judicial politics, a method of interpretation that directed judges to the principles and purposes underlying the constitution as sources of constraint was workable and desirable.

La Brie and Friedmann differed on the question of where to find these principles and purposes. La Brie's position was closer to the "fundamentalist" tendencies of the 1937 critiques. He relied on the historical purposes of the *B.N.A. Act* and believed the judge could and should be constrained by the principles "intended by the Act of 1867,"[51] and ascertainable through analysis of "Canadian,

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[47] *Ibid.* at 310.

[48] *Ibid.* at 344.

[49] *Ibid.*

[50] *Supra,* note 34 at 831.

[51] *Supra,* note 44 at 318.

British or United States history prior to, and at the time of, confederation."[52] LaBrie, like the earlier critics of the New Deal decisions, believed the Judicial Committee's understanding of the *B.N.A. Act* belied the true purposes of the *Act*. It showed "little appreciation of the statesmanship or vision entering into Canada's confederation" and thwarted "any ideal or purpose in the Act of 1867 going beyond the institutions immediately dealt with."[53] The historically true purposes of the constitution were, according to LaBrie:

> ... the founding of a united nation, the furtherance of a collective prosperity, the protection of minority groups, the laying of a constitutional foundation for the enjoyment of individual freedom and civil rights, the assurance of uniformity in the welfare, order, or good government of the nation at large.[54]

The proper function of the court in constitutional cases was to seek guidance in and vindicate these principles and policies, not to satisfy its own political agenda behind the guise of textual and doctrinal argument.

Friedmann relied on contemporary social consensus about values rather than historical intentions as the appropriate source of constraint in constitutional adjudication. He believed a middle position could be achieved between the unrealistic view that constitutional interpretation was "devoid of and remote from political and social issues,"[55] and the unacceptable view that it was partial, subjective and based on "political prejudices." The key was to understand the constitution as functioning to serve the fundamental principles and values of Canadian society which, in turn, could be relied on to constrain judicial choice and discretion. Such principles could be found in the "consensus of public opinion" and "the general trend in legislative policy"[56] in contemporary western democracies. They were principles that "would find acceptance by all major

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[52] *Ibid.* at 319. See, also, A. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Can. J. Pol. Sci. 301 at 335.

[53] *Ibid.* at 320.

[54] *Ibid.*

[55] *Supra*, note 34 at 831.

[56] *Ibid.* at 821.

political parties, and [were] embodied in the legislative practice of all contemporary democracies."[57] They were in this sense "neutral principles."[58] According to Friedmann, judicial choice and discretion in constitutional cases could be constrained if judges engaged in "impartial consideration" of these principles and "the many factors, of history, logic and political values which [went] into a constitutional document."[59]

Laskin did not share Friedmann's and LaBrie's concern to find new sources of constraint on judicial decision-making in the alleged purposes, historical or contemporary, of the constitution. For Laskin, the difficulty with the decisions of the Judicial Committee, was not that they were the product of judicial policy-making, but rather that they were the product of uninformed, hidden, and irrational policy-making. Unlike Friedmann and LaBrie, Laskin was not troubled by the political nature of constitutional adjudication. What troubled him about the Judicial Committee was its decidedly *apolitical* approach to constitutional adjudication: the Judicial Committee insisted on using narrow and legalistic techniques of interpretation when what was really needed was rational and realistic decision making informed by, and openly taking account of, social

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[57] *Ibid.* at 822. Friedmann was, however, aware that determining what the social consensus required was not easy:

> ... it is not an easy task for a court to fix the borderline between accepted evolutions in public opinion on the one hand, and personal philosophy or prejudice, on the other. The great judges of our time have always been conscious of this difficulty. Indeed it is their greatness that they have faced it, made it articulate, and gone some way to solve it in their own judicial practice.

Ibid. at 821. Nonetheless, he appeared quite confident in his ability to do it:

> In the last generation, a decisive shift has taken place in public opinion and in the legislative policy of all major parties. Conservatives and liberals, as well as socialists and communists, all reject unmitigated economic individualism. They hold the state responsible for creating conditions of stable and full employment; they accept the responsibility of the community for minimum standards of living, housing, labour conditions and social insurance.

Ibid. at 822-23. See, also, McWhinney, *supra*, note 26 at 201.

[58] Weschler, "Towards Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1.

[59] *Supra*, note 34 at 831.

and economic facts and policies. The decisions of the Judicial Committee, according to Laskin, found their "points of reference within the four corners of the *B.N.A. Act*, and [were] uninformed and unnourished by any facts of Canadian living which might have afforded a rational basis for ... constitutional determinations."[60] While "constitutional adjudication involve[d] considerations of policy and hence of social and political and economic beliefs,"[61] the Judicial Committee's interpretations were premised on "cold abstract logic,"[62] "rigid abstractions,"[63] "a sense of unreality ... which has anchorage only in the mind,"[64] and "inflexible concepts that [were] often the product of a neat mind, unwilling in the interests of some formal logic to disarrange thought patterns that had been nicely fitted together."[65] Laskin labelled Lord Watson a "constitutional houdini"[66] and Viscount Haldane a user of "magic" who was "ready to solve any problem by a prepared formula, invariable in its compounds, regardless of the matter to be solved."[67]

The Judicial Committee was, in Laskin's portrayal, off in the clouds, somewhere far away from the social and economic realities of contemporary Canadian society. And its failure to consider these realities in interpreting the Constitution was the cause of his skepticism about the legitimacy of its decisions. He admonished the Judicial Committee's "advertence to extrinsic materials"[68] and insisted on the need for courts to take account of "extrinsic materials" in constitutional cases.[69] Implicit in Laskin's critique of the Judicial

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[60] *Supra*, note 31 at 1059-60.

[61] *Supra*, note 30 at 123, 127.

[62] *Supra*, note 31 at 1059.

[63] *Ibid.* at 1060.

[64] *Ibid.*

[65] *Ibid.* at 1077.

[66] *Ibid.* at 1076.

[67] *Ibid.* at 1077.

[68] *Supra*, note 30 at 127.

[69] *Ibid.*

Committee was the view that judicial review could be legitimate, in spite of the inevitability of judicial policy-making, so long as judges were rational, honest, and realistic in reaching their decisions. *Trust* in judges as impartial and enlightened policy-makers was, for Laskin, the basis of legitimacy. While accepting that in difficult cases, "the course must be set by the light of the particular judge's mind,"[70] he trusted that light and was assured in his faith by the judiciary's "tradition of impartiality and security of tenure which mirrors their independence."[71] He only insisted that, when choosing between competing interests and concerns, judges made sure they were

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[70] *Supra*, note 30 at 127.

[71] *Supra*, note 31 at 1087. See also W.R. Lederman, "Classifications of Laws and the British North America Act" in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClellan and Stewart, 1964), in which he argued:

> The decision as to which classification is to be used for a given purpose has to be made on non-logical grounds of policy and justice by the legal authority with the duty and power of decision in that respect. The criteria of relative importance involved in such a decision cannot be logical ones, for logic merely displays to us as of equivalent logical value all the possible classifications. There are as many possible classifications of a rule of law as that rule has distinct characteristics or attributes which may be isolated as criteria of classification....

Ibid. at 185.

> In the making of these very difficult relative-value decisions, all that can rightly be required of judges is straight thinking, industry, good faith, and a capacity to discount their own prejudices. No doubt it is also fair to ask that they be men of high professional attainment, and that they be representative in their thinking of the better standards of their times and their countrymen.

Ibid. at 261. See also, McWhinney, *supra*, note 26 at 215:

> The argument in favour of the second view is that the judges are an elitist group of high talents, aspirations, and ideals; that, though they may not be omniscient or for that matter philosopher-kings, they are normally far better equipped intellectually than most people in government; and that, so long as they are aware of their own limitations, there is no grave risk of abuse of their great powers.... This is the civil libertarian activist conception of the judicial office and it bespeaks an affirmative right and even duty on the part of the judges to keep the political processes open, and free and unobstructed. It posits the maintenance of the free society on the existence of an independent judiciary and the entrusting to the judiciary of the responsibility, in the ultimate, for preservation of the Open Society ideal.

And see P. Monahan, "At Doctrines Twilight: The Structure of Canadian Federalism" (1984) 34 U.T.L.J. 47 at 64-66.

apprised of the factual context in which the dispute arose and the probable consequences of the choices they made. Though "honest men [might] well disagree on whether available data do or do not justify legislation of a particular character," such data would ensure, in Laskin's view, that there was a "rational basis" for the decision as opposed to its being based on the "unsupported predilections of the judge."[72] And that was enough to legitimate the judge's conclusions.

Friedmann, LaBrie and Laskin were writing around the time of abolition of appeals to the Judicial Committee in constitutional cases. Accordingly, their analyses were aimed primarily at the constitutional doctrine developed by the Judicial Committee. The Judicial Committee was not, however, responsive to its critics. Only on the rarest occasions did the Judicial Committee prescribe a broad and liberal approach to constitutional interpretation in place of the narrow and legalistic approach that was the norm. It never embraced a purposive approach that would have satisfied Friedmann or Labrie, nor an "enlightened policy-maker" approach that would have satisfied Laskin.[73]

The record of the Supreme Court of Canada after appeals to the Judicial Committee were abolished, is more complicated. There is some evidence of the purposive style of reasoning advocated by Friedmann and Labrie. During the 1950s, for example, there was a move toward constitutional decision-making on the basis of the purposes and principles which underlay the constitution as a whole.[74] In the 1960s, and most notoriously in its decisions under

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[72] *Supra*, note 31 at 1060. Laskin appears to have believed, for example, that the "sorry story" of the Privy Council's treatment of the New Deal cases might have gone differently if the social and factual circumstances of this legislation had been brought to bear on these decisions. If the Privy Council had considered such evidence it would have been impossible for them to "maintain a mythical consistency predicated on a fixed notion of the meaning of 'property and civil rights in the province.'" *Ibid.* at 1080.

[73] See *Edwards* v. *A.-G. Can.*, [1930] A.C. 124, at 136; *British Coal Corp.* v. *The King*, [1935] A.C. 500 at 518; *A.-G Ont.* v. *A.-G. Can.* [1947] A.C. 127 at 154. See, also, McWhinney, *supra*, note 26 at 66-67.

[74] P. Weiler, *In the Last Resort* (Toronto: Carswell Methuen, 1974) at 227. He states that:

> If we look at the broad sweep of decisions in the fifties, the Court was groping towards, and I think gradually achieving, what Karl Llewellyn has called the Grand Style of legal reasoning. The judges appreciated the complexity of the problems before them, canvassed a wider range of legal materials, adopted a critical view of

the *Canadian Bill of Rights*, however, the court returned to its legalistic and formal style.[75] More recently, the Court has adopted a purposive style of reasoning in some of its non-*Charter* decisions, though not in decisions concerning the division of legislative powers.[76] There is little, if any, evidence in Supreme Court of Canada decisions of the policy-oriented style of constitutional decision-making advocated by Laskin. Monahan has argued that there was a paradigm shift, around the time of the *Canada Temperance Federation*[77] decision in 1946, after which the Judicial Committee abandoned narrow and technical reasoning "in favour of an *explicit* balancing of federal versus provincial interests."[78] No doubt there were important substantive doctrinal shifts in the Judicial Committee's constitutional jurisprudence at this time, but I have found little evidence of *explicit* interest balancing in the cases. The attitude towards such arguments, then and now, is best summed up by the majority of the Supreme Court in a recent division of powers decision:

> the authority of any one of them and took their own personal but complementary paths to the underlying principle which pointed to the conclusion in the case.

See, also, McWhinney, *ibid.* at 234, and Snell & Vaughan, *supra*, note 3 at c. 8, 9.

[75] For discussion of the Court's approach to the *Canadian Bill of Rights, 1960,* see W.S. Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights" (1975) 53 Can. Bar Rev. 649; and J.G. Snell & F.F. Vaughan, *ibid.* at 214-32, esp. 218.

[76] *Reference Re Language Rights Under the Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1 (S.C.C.); *Reference Re Amendment of the Constitution of Canada* (1981), 125 D.L.R. (3d) 1 (S.C.C.); *Attorney-General Quebec* v. *Blaikie* (1979), 101 D.L.R. (3d) 394 (S.C.C.) and *Societe des Acadiens du Nouveau-Brunswick* v. *Association of Parents for Fairness in Education* (1986), 27 D.L.R. (4th) 406 (S.C.C.). In the latter decision, the majority judgement explicitly eschewed the purposive approach to interpretation of language rights, while the minority judges adopted this approach.

[77] *Attorney General for Ontario* v. *Canada Temperance Federation*, [1946] A.C. 193 (P.C.).

[78] P. Monahan, *supra*, note 71 at 67 [emphasis added]. Monahan argues that the first case to openly embrace an interest balancing methodology was *Attorney-General for Ontario* v. *Canada Temperance Federation, ibid.* I disagree with this. Quite the contrary to such an approach was the Committee's bold statement that "the drink" was a subject of national concern by its "inherent nature." There was no explicit balancing at all. None of this is to deny that interest-balancing takes place behind a doctrinal facade. This is a different claim, however. But see, P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117.

> ... in a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgement of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation.[79]

Perhaps it was the "regression" by the Supreme Court to formal and legalistic reasoning in the 1960s which contributed to the resurgence of calls by constitutional jurists in the 1970s that the Court abandon narrow and technical reasoning and embrace purposive reasoning. The substance of the claims by this generation of constitutional jurists was almost identical to those made twenty years earlier by Friedmann and LaBrie. Constitutional jurists of the 1970s, like Weiler, Hogg, Lyon and Laskin shared with Friedmann and LaBrie the views that : 1) narrow and technical reasoning did not sufficiently constrain judicial choice and discretion; 2) constitutional adjudication was, in the absence of constraint, "political;" and 3) judges could and should be constrained in constitutional cases by the purposes and principles underlying constitutional prescriptions. Again, like Friedmann and LaBrie, these jurists differed among themselves on the appropriate sources of constraint. Weiler and Hogg looked to the purposes and principles that underlay and rationalized conventional rules and doctrines of constitutional law, while Lyon and Laskin relied on contemporary society's "normative consensus."

Weiler, in a fashion reminiscent of earlier generations of constitutional scholars, attacked the Supreme Court of Canada for clinging to a narrow and legalistic approach to constitutional decision-making.[80] Such reasoning did not, in his view, constrain judicial choice and discretion. Quite the contrary, behind the "very abstract formulae"[81] employed in the Court's reasoning were political and value-laden decisions. The solution was, as it had been for Friedmann and LaBrie, for the Court to adopt purposive reasoning. For Weiler, purposive reasoning provided a plausible compromise

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[79] *Re Ontario Public Service Employees Union and Attorney-General for Ontario* (1987), 41 D.L.R. (4th) 1 at 39.

[80] *Supra*, note 74 at 229.

[81] P. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973) 23 U.T.L.J. 307 at 364.

between formalism at one extreme and unconstrained judicial choice at the other. While legal rules were sufficiently ambiguous to allow an intelligent judge to "rationalize almost any decision in the light of previous authorities," the judge did not "have discretion to choose any alternative he prefer[ed]."[82] It was possible to find a middle position between "two contrasting fallacies:" the first, that there was "a bright line between the legislative and the judicial power with judges merely applying established rules;" the second, that a judge "ought to be acting primarily with the aim of advancing certain substantive social goals in deciding which rules he will accept and act upon."[83] The solution was for judges to find guidance and constraint in the impersonal principles, purposes and policies underlying the legal rule or rules being interpreted.[84] Once a judge had elaborated these principles and policies, she or he could follow their "probable implications ... even when they [were] in opposition to his own personal values and policy preferences."[85]

Hogg followed Weiler in advocating purposive reasoning as the correct interpretive method in pre-*Charter*, constitutional

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[82] P. Weiler, "Legal Values and Judicial Decision-Making" (1970) 48 Can. Bar Rev. 1 at 25-26.

[83] *Ibid.* at 56.

[84] *Ibid.* at 19, Weiler said:

> ...rules must be conceived of as larger than their original statement, since they are purposive instruments, laden with objectives or policy choices. They are not enacted as ends in themselves, in the air as it were, but rather because of their supposed help in attaining certain social goals in the real world in which the law seeks to make a difference. These purposes form the approved basis for judicial elaboration of the original rule-statement, a judicial activity which can honestly be termed interpretation of the original efforts.

[85] *Ibid.* See also *ibid.* at 23, 26. At 26, Weiler said:

> [a judge] does not have discretion to choose any alternative he prefers or to justify this decision by any argument he believes relevant. Instead, he is obligated to consider, honestly and openly, the developing principles and policies in the relevant field, those which have been accepted as authoritative by the participants in the field. He is similarly obliged to evaluate these principles, and other authoritative materials, in the light of accepted standards and techniques for determining their importance and weight. He is then required to make the inference as to which legal conclusion is most probably demanded by such a reflective examination of the developing forces within the law, whether or not he personally likes the result.

adjudication. He too understood purposive reasoning as a satisfactory answer to the implausibility of formalism and the undesirability of unfettered judicial choice and discretion. While it was often the case in constitutional adjudication, according to Hogg, that "the language of the constitution [did] not speak clearly with respect to the question at hand, and the precedents [did] not quite cover the question at hand or were conflicting," constraint was still possible: "judicial choice is primarily governed by the body of legal policies and principles which underlie the more specific rules and which emerge from the statutes, cases and other conventional sources of law."[86] Relying on these sources would enable the judge to reach the *correct* result, "even if the result [did] not accord with his own policy preferences."[87]

Purposive reasoning was also the method of constitutional interpretation prescribed by Laskin and Lyon in the 1970s. As indicated earlier, however, these scholars located the source of constitutional purposes and principles in societal consensus on values, rather than the history of the constitution (LaBrie), or the principles underlying conventional sources of constitutional law (Weiler and Hogg). Their approach was most similar to Friedmann's with its emphasis on discovering consensual values that could transcend partisan politics. For Laskin (in 1973), purposive interpretation required the judge to understand constitutional law as "serving ends that express the character of our organized society,"[88] with the content of these ends determined by "the development of a consensus" in society.[89] Similarly, Lyon argued that a written constitution should be understood as designed to protect and

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[86] P.W. Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases?" (1979) 57 Can. Bar Rev. 721 at 722-23.

[87] *Ibid.* at 723. For example, while the question of an Act's "pith and substance" is "inevitably one of policy," the only "policies" the judge may consider are those that underlie the division of powers scheme: "The only 'political' values which may be accepted as legitimate to judicial review are those that have a constitutional dimension to them, that is, values that may reasonably be asserted to be enduring consideration in the allocation of power between the two levels of government." P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 323.

[88] Laskin, "The Function of Law" (1973) 11 Alta. L. Rev. 118 at 119.

[89] *Ibid.*

promote society's "shared goals."[90] These shared goals were to be found in the "consensus among people as to certain basic values" and in the reflections of "the true aspirations of a continuing majority (at least) of the Canadian people,"[91] and could, once ascertained, function to constrain judicial choice and discretion in constitutional adjudication.[92]

Purposive reasoning was thus understood by all of the scholars who were its advocates, as meeting the objections against formal, narrow and technical reasoning, while, at the same time avoiding the view, held by Laskin in his early days, that the Constitution was as open as the minds of those who interpreted it. The purposive approach to interpretation was portrayed by these scholars as a more developed and sophisticated scheme for constraining judicial choice than narrow and technical reasoning – one that infused with meaning the often vague and indeterminate constitutional text and doctrine. It "admitted the partial impurity or implausibility of legal formalism to sustain the fundamental message of formalism that the rule of law is more than just an imposition of the subjective values and political biases of judges."[93] The next section will analyze and then criticize the adoption of purposive

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[90] N. Lyon & R.G. Atkey, *Canadian Constitutional Law in a Modern Perspective* (Toronto: University of Toronto Press, 1970) at 70.

[91] *Ibid.* at 67.

[92] *Ibid.* at 68.

> In order to provide continuity of basic values a high degree of formalization is required, and this means that a technique is necessary before ultimate decision on important questions can be arrived at. Thus there develops a body of decision-makers who evolve and perpetuate the necessary technique, without which basic community values could not be guaranteed against erosion. We call these men judges and put the full power of the community behind their decisions. Access to these central positions of community power is, needless to say, open only to those who have demonstrated beyond doubt a skill in the objective perception of community expectations, coupled with a capacity to subordinate subjective criteria to perceived community expectations.

[93] N.C. Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" in Boyle *et al.* eds, *Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986) 195 at 206. See, also, K. Klare, "Judicial Deradicalization of the *Wagner Act* and the Origins of Modern Legal Consciousness" (1978) 62 Minn. L. Rev. 265 at 280.

reasoning by the Supreme Court of Canada in the majority of cases it has decided under the *Charter*.

II.

The legitimacy of judicial review became a matter of central concern in Canadian constitutional discourse with the entrenchment of the *Charter* in 1982. From that time on, judicial review has necessarily involved judges in scrutinizing the substance of legislative and governmental initiatives for their compliance with extremely vague and open-textured articulations of rights and freedoms. Not surprisingly, the corresponding expansion of the scope of judicial activity has intensified concerns about judicial power in constitutional adjudication. Academic and judicial constitutional discourse concerning the *Charter* has focused heavily on defining and prescribing methods of interpretation that can be relied upon to legitimate the exercise of judicial power in constitutional cases. As we shall see, *constraint* and *trust* provide the structural dimensions of this discourse as they did in pre-*Charter* constitutional thought. This Part will examine the predominant constraint-based method of interpretation used by the Court in *Charter* adjudication. The method involves, first, purposive interpretation of the *Charter's* guarantees of rights and freedoms, and, second, a four-part set of criteria for applying the open-ended standards of section 1. After describing and analyzing each of these, I will demonstrate that neither functions to constrain judicial choice and discretion and, therefore, that both are insufficient as constraint-based grounds of formal legitimacy in *Charter* adjudication.

At the time of the *Charter's* entrenchment in the Constitution, and before the Supreme Court had decided any cases under it, constitutional scholars expressed concern that the Court might resort to narrow and legalistic techniques of interpretation in *Charter* adjudication. They implored the Court to adopt a purposive approach to interpretation, one that called for elaboration and application of the purposes and principles which underlay and informed the various rights and freedoms articulated in the *Charter*. Without adopting such an approach, they argued, the Court would simply impose its conservative views on the *Charter* — as it had done

on the *Canadian Bill of Rights* – under the guise of narrow legalism. The provisions of the constitution were, taken on their own, too vague and open-textured to avoid such judicial politicking. Constraint of judicial choice and discretion in *Charter* adjudication could be achieved, it was argued, through techniques of interpretation designed to uncover and apply the purpose or principle underlying each right or freedom.[94]

In its first decisions under the *Charter*, the Supreme Court adopted purposive reasoning as the appropriate technique for interpreting and applying the rights and freedoms guaranteed by the *Charter*.[95] The court insisted in these cases that the constitution could not be interpreted "by reference to rules of statutory construction."[96] It was to avoid the "austerity of tabulated

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[94] Scholars differed on the question of what sources the courts should look to in determining the purpose of a right or freedom – history, fundamental values or traditions, or the principles underlying conventional sources of constitutional law. See, for examples: Roman, "The Charter of Rights: Renewing the Social Contract?" (1982-1983) 8 Queen's L.J. 188 at 190, 193, 198 (arguing judges must turn to political and legal history to give meaning to rights and freedoms); P. Monahan, Book Review (1983) 61 Can. Bar Rev. 434 at 436 (arguing that, in order to apply section 1, the judge needs a background theory of the nature and requirements of the democratic polity); N. Lyon, "The Charter as a Mandate for New Ways of Thinking About Law" (1983) 9 Queen's L.J. 241 at 242 (arguing that judges must move away from the text of the Charter and to the political tradition the *Charter* is meant to reflect); N. Finkelstein, "Section 1: The Standard for Assessing Restrictive Government Actions and The Charter's Code of Procedure and Evidence" (1983) 9 Queen's L.J. 143 at 143-45 (arguing that the Charter directs the courts to examine the underlying basis of modern society which is that "people still enter into society for the limited purpose of self preservation"); C. Beckton, "Freedom of Expression: Access to the Courts" (1983) 61 Can. Bar Rev. 101 at 122-23 (arguing that the courts must develop theories that are not premised solely on the judge's perception of which societal values are important); M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Sup. Ct. L. Rev. 131 at 131-34 (arguing that judicial power is limited by the duty to take into consideration certain basic principles that inform the enterprise upon which the Court is embarked); P. Rogers, "Equality, Efficiency and Judicial Restraint" (1986) 10 Dalhousie L.J. 139 at 183-87 (arguing that judicial choice can be constrained by a principle which requires judges to make sure judicial power is used to strike down statutes which infringe substantive equality).

[95] *Law Society of Upper Canada* v. *Skapinker* (1984), 9 D.L.R. (4th) 161 at 168 (S.C.C.).

[96] *Hunter* v. *Southam* (1984), 11 D.L.R. (4th) 641 at 649 (S.C.C.). It is important to realize however that while purposive reasoning is the predominant structure of constraint-based arguments in Charter jurisprudence, the Court has persisted in using "narrow and legalistic" techniques in interpreting the Charter in a number of its decisions. In *Dolphin Delivery*, the majority of the Court relied on textual and legalistic arguments to determine the meanings of ss. 32 and 52 of the *Charter*. It assumed the words of each provision could determine the provisions' particular meanings. The court argued, with respect to Section 52,

legalism,"[97] "narrow and technical" construction,[98] and engage in "broad, liberal and purposive" interpretation. The Court noted that such an approach was a familiar theme in Canadian constitutional

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that the word "law" in the section clearly included the common law. Therefore, according to the Court, the common law was subject to the *Charter*. To hold otherwise, the court stated, "would be wholly unrealistic and contrary to the clear language employed in Section 52(1) of the Act." *Supra*, note 2 at 190-91. Similarly, the "clear language" of section 32 was invoked in support of the Court's conclusion that the Charter did not apply to the courts. The text of section 32 was, in the court's view, "conclusive on this issue:" the words *parliament*, *legislature*, and *government* specified that the Charter applied only to the "legislative, executive and administrative branches of the government."

> Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word "government" is used in s.32 it refers not to government in its generic sense, meaning the whole of the governmental apparatus of the state, but to a branch of government. The word "government," following as it does the word "Parliament" and "Legislature," must then, it would seem, refer to the executive or administrative branch of government.... This is the sense in which the words "Government of Canada" are ordinarily employed in other sections of the Constitution Act of 1867.... The words "Government of Canada," particularly where they follow a reference to the word "Parliament," almost always refer to the executive government.

Ibid. at 194. The strict construction approach to interpretation has been employed by members of the Court in a number of cases, though Justice McIntyre is its most consistent user. See *Mills* v. *The Queen* (1986), 29 D.L.R. (4th) 161 (S.C.C.), for example, where Justice McIntyre argued in the plurality opinion that, on the basis of the clear words of section 24(1) of the *Charter*, a failure to try an accused "within a reasonable time" for a purpose of s. 11(b) of the *Charter* did not necessarily deprive the trial court of jurisdiction to try the accused. In *Dubois* v. *The Queen* (1985), 23 D.L.R. (4th) 503 (S.C.C.), Justice McIntyre dissented from the Court's decision that section 13 of the *Charter* prevented the Crown from reading in the accused's testimony from a first trial at a retrial ordered by the Court of Appeal. His reasons again emphasized that the result followed clearly from the text. In his concurring reasons in the *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (1987), 38 D.L.R. (4th) 161 (S.C.C.) [hereinafter *Alberta Reference*], Justice McIntyre argued that his conclusion that freedom of association did not protect the right to strike was supported by the absence of an independent textual reference to the right to strike. *Ibid.* at 231-32. He relied on a similar argument to deny protection of the right to have an abortion by S.7 of the *Charter*, in *R.* v. *Morgentaler* (1988), 44 D.L.R. (4th) 385 at 469 (S.C.C.).

[97] *Ibid.* at 650, citing *Minister of Home Affairs* v. *Fisher* (1979), [1980] A.C. 319 at 329.

[98] *Supra*, note 95 at 168.

jurisprudence, "applied in countless cases."[99] It was also, in the Court's view, "consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch* v. *State of Maryland*," as well as consistent with contemporary cases decided by the Judicial Committee of the Privy Council under constitutions of countries that still referred appeals in constitutional cases to that body.[100]

The purposive approach to constitutional interpretation required, according to the Court, that the interpreter determine the interests and values the provision being interpreted was meant to protect.[101] The Court acknowledged that many of the Charter's provisions were vague and open-textured, and that it was implausible to believe meaning could be determined by reference to the text alone.[102] The problem could be solved, however, by supplementing interpretation of the text with reference to extrinsic sources, namely, the history, traditions, and fundamental values of society.[103] According to McIntyre J. "[a charter guarantee] which by itself does not in any way define [its scope] must be construed with reference to the constitutional text and to the nature, history, traditions, and social philosophies of our society."[104] The Court presumed in the cases in which it developed and applied the purposive approach that every right or freedom had a distinct and uncontroversial purpose which could be disclosed by interpretation of these extrinsic sources.

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[99] *Ibid.* at 167. Though only one case, the "Person's case," *Edwards* v. *A.-G. Can.*, *supra*, note 73, was cited. Indeed, as the history of criticism of constitutional interpretation suggests, the "living tree" doctrine developed in the "Person's case" was not as alive as suggested by the Court's comment. See *supra*, notes 76-78 and accompanying text.

[100] *Hunter* v. *Southam*, *supra*, note 96 at 650, citing *M'Culloch*, 17 U.S. 316 (1819).

[101] The purpose is to be understood "in the light of the interests [the right or freedom] was meant to protect" (*Regina* v. *Big M Drug Mart* (1985), 18 D.L.R. (4th) 321 at 359), and the "cardinal values" it embodies (*Regina* v. *Oakes* (1986), 26 D.L.R. (4th) 200 at 212).

[102] *R.* v. *Big M*, *ibid.* at 359. *Hunter* v. *Southam*, *supra*, note 96 at 649.

[103] *R.* v. *Big M*, *ibid.* at 359-60.

[104] *Alberta Reference*, *supra*, note 96 at 224.

In such sources the court would find the principles and policies[105] each provision was meant to serve, and these could then be applied to determine the outcome of particular constitutional disputes. The relationship envisioned between purposive reasoning and constraint on judicial choice in *Charter* discourse was similar to that we have seen in earlier discussions of purposive reasoning. In short, it was assumed that, where the constitutional text was vague, indeterminate and, therefore, incapable of constraining judicial choice, the decision-maker could nonetheless be constrained by the purposes and principles that underlay the text.[106] The notion that the law of the Constitution ruled, rather than the predilections of judges, was thereby maintained.[107]

Members of the Supreme Court have insisted on numerous occasions that the Court's only legitimate function is to apply the law of the Constitution, not to question the wisdom and policies of the legislature.[108] Purposive reasoning is understood as fully concordant with these strong affirmations of the constraint exercised by the Constitution on the decision-making of judges. On several occasions, members of the Court have explicitly drawn the link between purposive reasoning and constraint. In the *Motor Vehicle Reference*, for example, Lamer J. stated that the task of securing the full benefits of the *Charter* for individuals while "avoiding adjudication of the merits of public policy" could "only be accomplished by a purposive analysis."[109] Similarly, in *Morgentaler*, McIntyre J. noted that the purposive approach requires courts to

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[105] The Court often uses the terminology of values and interests rather than principles and policies. For the purposes of this paper *values* and *principles* will be treated as describing the same thing, as will *interests* and *policies*.

[106] A similar approach is taken in P. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall L.J. 87.

[107] *Ibid.* at 29.

[108] The Court, and members of it, have insisted on a number of occasions, that its only legitimate role is to apply the law and that it must not question the wisdom and policies of the legislature: *Operation Dismantle* v. *The Queen* (1985), 18 D.L.R. (4th) 481 at 494 and 503 (S.C.C.); *Hunter* v. *Southam*, *supra*, note 96 at 659-60; *Law Society of Upper Canada* v. *Skapinker*, *supra*, note 95 at 170; *Reference re Section 94(2) of the Motor Vehicle Act* (1985), 24 D.L.R. (4th) 536 at 544, and *R.* v. *Morgentaler*, *supra*, note 96 at 393-94.

[109] *B.C. Motor Vehicle Reference*, *ibid.* at 546.

"interpret the *Charter* in a manner calculated to give effect to its provisions, not to the idiosyncratic view of the judge who is writing," and that purposive reasoning "prevents the Court from abandoning its traditional adjudicatory function in order to formulate its own conclusions on questions of public policy, a step which this Court has said on numerous occasions it must not take."[110]

Thus the Court, like the constitutional jurists we looked at earlier, has understood purposive reasoning as a "compromise" between the implausible view that judicial decision-making can be constrained by the constitutional text and doctrine, and the unacceptable view that judicial decision-making is nothing more than judicial policy-making. The burden of the argument in favour of this compromise is that purposive reasoning *does* constrain judicial choice and discretion. This is, I believe, a burden that cannot be satisfied. Indeed, the position that the constitutional text and doctrine are insufficient to constrain judicial choice, but that constitutional purposes and principles are sufficient, is an example of the truism that unsolvable problems lead to untenable solutions. The point is put well by Gary Peller : "... the demonstration of the inherent indeterminacy of legal rules would at first glance seem to apply just as easily to attempts to ground legal decision-making in the identification and application of purposes, policies and principles."[111] The same holds true at second glance. The belief that purposive reasoning provides for constrained judicial decision-making, and thereby avoids the difficulties raised by judicial choice and discretion, is grounded in two implausible assumptions: first, that the purpose of a constitutional provision can be identified without the interposition of judicial subjectivity; and second, that the purpose, once identified, can be applied to determine uncontroversially the results of particular disputes.

The first assumption is manifest in the pre-*Charter* discussions of purposive reasoning we looked at earlier. The jurists discussed were united in their belief that the principle or policy identified as the purpose of a constitutional provision, or the constitution as a

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[110] *R.* v. *Morgentaler*, *supra*, note 96 at 466-67.

[111] G. Peller, "The Metaphysics of American Law" (1985) 73 Cal. L. Rev. 1152 at 1152-53.

whole, could be grounded in a consensus about history, the fundamental values of society or the conventional sources of constitutional law. Thus, it was thought possible to identify a purpose that was constitutionally "true," rather than the product of choice and a subject of controversy. Scott, MacDonald, Kennedy and La Brie, for example, supported their views on what the constitution required by referring to the "uncontroversial" (at least in their minds) intentions of the constitutional framers. Friedmann, and later Lyon and Laskin, believed the purposes of constitutional norms could be found in a consensus of public opinion about shared goals and values – principles that "would find acceptance by all major political parties."[112] For Weiler and Hogg the relevant principles were those that could be uncontroversially identified as underlying the conventional sources of constitutional law.

The Court has adopted all of these sources – history, fundamental principles of society, and underlying principles of constitutional law – as appropriate places to find the purposes of *Charter* rights and freedoms. The purpose of a right or freedom must be ascertained through analysis of its "historical origins," the "values that underlie our political and philosophic traditions"[113] as well as the "larger objects of the Charter itself" and the language and textual context of the right or freedom in question. The Court appears to operate on the assumption that, through analysis of these sources, it will be possible for judges, and other constitutional interpreters, to reach conclusions on what purpose a given right or freedom is supposed to serve without exercising choice or discretion. The judicial task is simply to identify the principles and purposes that *all* would agree informed the right or freedom being interpreted.[114] This is, of course, an impossible task. The question

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[112] *Supra*, note 34.

[113] *Big M, supra*, note 101 at 361.

[114] In D. Beatty & S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988) 67 Can. Bar Rev. 573, the authors explicitly draw the connection between determinacy and consensus. They argue that determinacy in constitutional interpretation depends on the possibility of elaborating definitions of rights and freedoms "*which everyone could accept.*" *Ibid.* at 584. Beatty and Kennett believe such definitions can be found and, therefore, that "determinate solutions – right answers – do exist ..." in constitutional law. *Ibid.* at 576.

"what is the purpose of a right or freedom" is not one that yields a uniquely correct and uncontroversial answer. Questions about the history of a right or freedom, or the political and philosophic values it supposedly embodies, are political and value-laden: they are not matters of legal right and wrong.[115]

Let us look at the *Charter's* guarantee of freedom of association, and the Court's interpretation of that freedom, to illustrate the point. In the *Alberta Reference*[116] the Court was asked to decide whether freedom of association included the right to strike. In reaching their conclusion that it did not, the two judges writing in the majority, Le Dain J. and McIntyre J., reasoned that the purpose of freedom of association was to protect the freedom of individuals to associate with one another, not the freedom of the association to pursue its essential activities. Dickson, C.J.C, in dissent, understood the purpose of freedom of association in quite different terms. For him, the purpose of freedom of association was to protect the activities of associations necessary for achieving their collective goals. On comparing McIntrye J.'s judgement to Dickson C.J.C.'s judgement, it is apparent that the disagreement about the purpose of freedom of association can best be understood as a

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[115] S. Wright, "The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges" (1987) 14 Hastings Const. L.Q. 487 at 502:

> The problem with reference to tradition and consensus as a neutral repository of value in judicial decision-making is twofold. First, judicial review of legislative enactments requires that judges have some theory that can plausibly criticize majoritarian choices. Reference to tradition or consensus to decide difficult constitutional questions dangerously limits the critical "bite" required for effective judicial review. Majoritarian conservative judges, however, might not find this limitation objectionable. A more significant difficulty is that reference to "tradition" or "consensus" assumes there is such a thing (or things). After all, we are wary of the non-elected judiciary making value choices precisely because they are so contested in our society. We want judges to decide cases without reference to values because we acknowledge that individuals disagree about them. Thus it makes little sense for judges to refer to some purported agreement on fundamental issues when it is existing *disagreement about them that impels the search for a neutral referent.*

[116] *Supra*, note 96.

conflict between two competing political visions: "individualism" and "collectivism."[117]

In his reasons McIntyre J. held that the *Charter* was designed to protect individual rights and did not extend to group rights. Therefore, according to him, freedom of association was "a freedom belonging to the individual and not to the group formed through its exercise."[118] Its purpose was to protect the "attainment of individual goals" through group activity.[119] Accordingly, the purpose of freedom of association was to protect the rights of individuals to form and join groups, to exercise their individual constitutional rights in groups, and to do in association what they were lawfully entitled to do as individuals. By definition, then, any understanding of freedom of association that "accord[ed] an independent constitutional status to the aims, purposes and activities of the association" had to be rejected.[120] In contrast, Dickson C.J.C. understood the purpose of freedom of association as including protection of the activities of collective entities *qua* collective entities. He pointed to "our constitution's history of giving special recognition to collectivities or communities of interest other than the government and political parties"[121] and emphasized that "association ha[d] always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations."[122] Freedom of association did not, therefore, find its only point of reference in the individual:

> There will ... be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely

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[117] For explications of constitutional theories grounded in each of these respective ideologies, see D. Beatty, *Putting the Charter to Work* (Kingston and Montreal: McGill-Queen's University Press, 1987), P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987). For a discussion of ideology in constitutional law, see P. Macklem, *supra*, note 78.

[118] *Alberta Reference, supra,* note 96 at 219.

[119] *Ibid.* at 218.

[120] *Ibid.* at 225.

[121] *Ibid.* at 196.

[122] *Ibid.* at 197.

> the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different.[123]

For Dickson C.J.C, freedom of association was vested in the association — the union — not each individual member, and its purpose was to protect the essential activities of the associations — strikes and collective bargaining.

The conflicting characterizations of the purpose of freedom of association in the *Alberta Reference* illustrates the implausibility of the assumption that judicial choice and discretion can be avoided through purposive reasoning. If judges must choose between different and often conflicting formulations of the purpose of a right or freedom, the problem of judicial subjectivity is reproduced rather than avoided. This difficulty is not, of course, confined to freedom of association. A smidgen of imagination reveals the impossibility of discovering the unique and uncontroversial purpose of any of the rights and freedoms. Is the purpose of freedom of expression to protect the functioning of democratic institutions, and thus confined to political speech, or is it aimed at providing a "marketplace of ideas" in all sectors and thus inclusive of commercial or artistic speech?[124] Is the purpose of freedom of religion confined to ensuring that people are free to engage in religious exercises and practices, or does it extend to a requirement of state neutrality in matters of religion and thus preclude state support of (as well as interference with) religion?[125] Is the purpose of equality to ensure similar treatment of all groups, or does it require differential

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[123] *Ibid.* at 198.

[124] Compare *Ford* v. *Attorney-General of Quebec* (unreported, S.C.C., Dec. 15, 1988), *Irwin Toy Ltd* v. *Attorney-General of Quebec* (1986), 32 D.L.R. (4th) 641 (C.A.), and *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.) with *Re Rocket and Royal College of Dental Surgeons* (1988) 49 D.L.R. (4th) 641 (Ont. C.A.), and *Re Griffin and College of Dental Surgeons* (1988) 47 D.L.R. (4th) 331 (B.C.S.C.)

[125] *Big M, supra,* note 101; and *Edwards Books and Art* v. *R.* (1986), 35 D.L.R. (4th) 1.

treatment to ameliorate existing maldistributions of social and economic power?[126]

All of these questions raise highly contentious political issues that will often generate very different answers within the judicial and legal community. The implausibility of consensus on such questions becomes even more pronounced when we leave the judicial and legal community. It is an odd notion that a meaningful social consensus about political and moral values, history and traditions, exists in Canada, transcending the conflicting interests and perspectives that constitute Canada's social and economic order. Canadian society is not only "multi-cultural"[127] and composed of people of "diverse socio-cultural backgrounds,"[128] as the court acknowledges. It is also structured by social relations of domination and subordination. While all groups and individuals are treated as *formal* equals by the law, the *actual* inequality of life options and social and economic conditions suffered by workers, women, immigrants, Aboriginal Peoples, ethnic and racial minority groups, *et cetera* is undeniable.[129] The idea of social consensus suggests that, despite the actual structures of difference and domination that define peoples lives, agreement on the fundamentals of the social, economic and political order exists among all individuals and groups in society, or at least a substantial majority of them.

The premise of purposive reasoning is that the principle or policy identified as the purpose underlying a right or freedom is supported by a social consensus, or at least a consensus about its place in the history and traditions of society. The plausability of such consensus occurring cannot be sustained, however, once we account for the structures of difference and domination that

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[126] See, for example: *Ertel Ltd* v. *Johnson* (1986), 25 D.L.R. (4th) 233 (Ont. Div. Ct.); *Andrews* v. *Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600 (C.A.), appeal to the S.C.C. granted November 28, 1986; *Blainey* v. *Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728 (Ont. C.A.); and *Action Travail des Femmes* v. *Canadian National Railway Co.* (1987), 40 D.L.R. (4th) 193 (S.C.C.). See also N.C. Sheppard, *supra*, note 93.

[127] *R.* v. *Big M*, *supra*, note 101 at 355.

[128] *Ibid.* at 365.

[129] See, for examples of non-dominant perspectives on social, economic and political issues in Canada, D. Drache & D. Cameron, *The Other MacDonald Report* (Toronto: J. Lorimer, 1985).

constitute the social and economic order. The identification of a right or freedoms' purpose requires, as the Court has told us, determination of the interests the right or freedom is meant to protect. Convergence of interests is a rather strange idea in a society where some are dominant and others dominated. The notion that groups and individuals in society *genuinely* consent to arrangements amicable to their interests and concerns is not plausible. Yet that is the premise of the view that a consensual, or uncontroversial, purpose can be identified for a given right or freedom. When a right or freedom is said to protect a particular interest the assumption is that a consensus exists on the paramountcy of that interest and its relationship to the right or freedom. Such consensus cannot, however, exist in a social order premissed on conflicting interests between those with power and those without. As John Ely has pointed out: "... there is no consensus to be discovered (and to the extent that one may seem to exist, that is likely to reflect only the domination of some groups by others)."[130]

None of this is to deny that the appearance of consensus might be achieved, even in a divided and diverse society like ours, by characterizing principles and policies at such a level of abstraction and generality as to enable them to mean anything to anybody. This move, however, triggers the second challenge to the assumption that purposive reasoning can constrain judicial choice and discretion.[131]

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[130] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 63. See also: G. Braden, "The Search for Objectivity in Constitutional Law" (1948) 57 Yale L.J. 571 at 584-89 (arguing that Frankfurter J.'s reliance on consensus as constraining his choice was incoherent because of the multiplicity of perspectives from which consensus could be gauged); G.E. White, "From Realism To Critical Legal Studies: A Truncated History" (1986) 40 Southwestern L.J. 819 at 829 (arguing that the realization in the 1960's that a whole class of people, blacks, had been existing outside the American mainstream, shattered the sense that consensus was possible in American Society). See also S. Martin & K. Mahoney, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987). For discussions of the notion of consensus and its relationship to ideology, see C. Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law* (London and New York: Acedemic Press, 1979).

[131] For examples of the argument that policies and principles discovered through purposive style reasoning are either formulated in a way that is controversial because of their particularity, or indeterminate (and thereby controversial in their application) because of their generality, see Unger, *Knowledge and Politics* (New York: The Free Press, 1975) at 94-98; Unger, *Law in Modern Society* (New York: The Free Press, 1976) at 192-200 and 203-10; Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561 at 568-73; and

This challenge is encountered at the stage of applying the purpose identified to resolving a given dispute. It seems obvious that the purposive approach is of little assistance if the purpose identified is no more constraining than the provision itself. Vague definitions of purpose are no better than vague textual provisions. This point was made by Dickson C.J.C. in the context of division of powers jurisprudence when he noted that certain judicially created definitions of section 91(2) of the *Constitution Act, 1867* were unhelpful because they were "hardly ... narrower than ... a literal reading of the words 'regulation of trade and commerce' alone."[132] In the context of the *Charter*, the same critique might be applied to the definitions arrived at by the Court through purposive reasoning.

In the *B.C. Motor Vehicle Reference*,[133] for example, the majority promised "objective and manageable standards" through purposive analysis. What we actually got, from a purposive analysis of the admittedly ambiguous phrase "principles of fundamental justice," however, was the equally ambiguous statement that such principles "are to be found in the basic tenets of our legal system."[134] It is difficult to see how the words "basic tenets of our legal system" are any more specific or determinate than "principles of fundamental justice:" how does the former phrase have any more power to constrain judicial choice and discretion than the original text of the *Charter*? The definition falls far short of the Court's promise that it would provide "*meaningful* content for the section 7 guarantee all the while avoiding adjudication of policy matters."[135]

A second illustration is the decision in *Hunter* v. *Southam*.[136] In that case the Court interpreted the "right to be secure against unreasonable search or seizure" through purposive analysis. The

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J.H. Ely, *ibid.* at 63-69.

[132] *Attorney-General of Canada* v. *Canadian National Transportation Ltd* (1983), 3 D.L.R. (4th) 16 at 58 (S.C.C.).

[133] *Supra*, note 108.

[134] *Ibid.* at 550.

[135] *Ibid.*

[136] *Supra*, note 96.

Court noted that the word "unreasonable" was "vague and open" and could not be defined by "recourse to a dictionary, nor for that matter by reference to rules of statutory construction."[137] Nonetheless, the Court believed it would be "possible to assess the reasonableness or unreasonableness of the impact of a search" by identifying the purpose underlying section 8.[138] After analysis of a number of different sources, the Court concluded that the purpose of s. 8 was "to protect individuals from unjustified State intrusions upon their privacy."[139] Given the vague and ambiguous language of this definition, it is difficult to see how the definition is any more constraining than the provision itself. Indeed, the Court's conclusion that, for a search to be valid under section 8, there must be "prior authorization, usually in the form of a valid warrant,"[140] issued by a "neutral and detached" person,[141] and based on "reasonable and probable grounds, established upon oath"[142] for the grantor's belief that the search would disclose the evidence being sought, does not appear to follow necessarily from the purpose of the right or freedom identified by the Court.[143] The question of what types of state interference are or are not justified is not susceptible to an uncontroversial and legally correct answer. It is – like the question of what are the "basic tenets of our legal system" – a matter of opinion on which people will differ.[144]

Many more examples might be used to illustrate that purposive reasoning does not avoid the difficulties raised by the vague and indeterminate nature of the constitutional text. The

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[137] *Ibid.* at 649.

[138] *Ibid.* at 650-51.

[139] *Ibid.* at 653.

[140] *Ibid.*

[141] *Ibid.* at 656.

[142] *Ibid.* at 659.

[143] P. Hogg, *supra*, note 106 at 102-04, 113 for a defense of the reasoning and outcome in *Hunter* v. *Southam*.

[144] See A. Petter, "The Politics of the Charter" (1986) Sup. Ct. L. Rev. 473 at 490-98; and P. Monahan & A. Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 Sup. Ct. L. Rev. at 76-77.

rights and freedoms entrenched in the *Charter* invite disagreement and controversy when questions are raised about the purpose they are supposed to serve. And if such disagreement is avoided by articulating the purpose at a high level of abstraction and generality, it re-emerges when arguments must be made about what that purpose requires in a particular situation. For these reasons, purposive reasoning does little to support the plausibility of a constraint-based theory of legitimacy. It does not avoid the interposition of judicial subjectivity between the prescriptions of the constitution and the outcomes of constitutional adjudication. Therefore, purposive reasoning cannot sustain the burden of the argument that adjudicative outcomes are *determined* by the constitution. As we will see in Parts III and V, two responses might be made to this criticism, both in defence of the legitimacy of judicial review. First, it can be argued that constraint is not necessary for judicial review to be legitimate. Judicial choice and discretion are appropriate if informed and rational. Second, the argument can be made that constitutional interpretation *is* objective and constrained despite its indeterminacy. Before analyzing these two arguments however, I will examine Section 1 of the *Charter* in the context of constraint-based theories of legitimacy.

As noted above, the predominant form of Charter interpretation in the Supreme Court's jurisprudence involves two steps: first, the content of the right or freedom must be defined by ascertaining its purpose (the process we have just looked at); and second, if a limit on the right or freedom is found, the Court must apply the standards articulated in Section 1 and ask whether the limit is "reasonable" and "demonstrably justified in a free and democratic society." The impugned government action will be upheld if it meets these standards, despite its limiting a right or freedom. Section 1 poses a significant problem for those who rely on constitutional constraint to legitimate judicial review. One would be hard-pressed to come up with standards any more open-textured and indeterminate than those prescribed in Section 1. Whether a governmental action is "reasonable" and "demonstrably justified in a free and democratic society" is a matter of opinion and political choice, not a technical legal question. In a number of its decisions, the Court has attempted to mediate the contradiction between its commitment to constraint based legitimation strategies and the

inevitably political nature of the questions that arise in the section 1 inquiry.

The leading case is *Regina* v. *Oakes*.[145] In that case Dickson C.J.C., writing for the majority, established a set of criteria to structure the Section 1 inquiry in all *Charter* cases. In place of the open-ended and politicized question of whether a particular government action was "reasonable" and "demonstrably justified in a free and democratic society," the Court imposed a four-step legal test. A government action would be upheld under Section 1, only if: 1) the purpose of the impugned action was "of sufficient importance to warrant overriding a constitutionally protected right of freedom;" 2) the measures adopted were "rationally connected to the objective;" 3) the measures, "even if rationally connected to the objective in the first sense, ... impair[ed] as little as possible the right or freedom in question;" and 4) the "deleterious effects" of a measure "[were] outweighed by the importance of the objective."[146] The translation of the ambiguous and general language of the Section 1 text into a neat four-step test was clearly an attempt by the majority to avoid having to confront directly evaluating a restriction's reasonableness and demonstrable justification in *Oakes* and in future cases. Such an evaluation, after all, has the appearance of an inquiry into the wisdom and political desirability of the legal prescription responsible for the restriction. The *Oakes* test functions to make the inquiry look legal rather than political, an appearance further supported by the majority's precise specifications concerning the onus and standard of proof.[147]

The appearance of legalistic constraint is, however, an illusion. As we saw in the analysis of purposive reasoning above, attempts to inject content into vague and indeterminate textual provisions cannot escape the indeterminacy of those provisions. Such attempts inevitably raise two questions: first, why is one definition of a vague standard necessarily better than any other; and, second, how can we avoid the vagueness and indeterminacy of the

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[145] *Supra*, note 101.

[146] *Ibid.* at 227-28.

[147] *Ibid.* at 226-27. Though the Court leaves open the possibilty of the government not adducing evidence where elements of s. 1 analysis are "obvious or self-evident."

definitions themselves? Both questions are raised by the Court's interpretation and application of Section 1 in *Oakes* and the cases following it. In the first place, it is not clear why the four criteria in the Oakes test constitute a uniquely correct interpretation of Section 1. The words "reasonable limit" and "demonstrably justified in a free and democratic society" do not necessarily, nor even obviously, translate into the four-step test elaborated by the majority. The argument that the four-step test was *determined* by the text of section 1 and the purposes which supposedly underlie it is highly implausible.[148] The majority appear to believe that the four criteria follow from the need for a "stringent" (i.e., difficult for the government to meet) standard of justification under Section 1, which, in turn, follows from the Charter's purpose of protecting rights and freedoms and "the fundamental principles of a free and democratic society." This chain of reasoning may be appealing, but it is hardly one that would qualify as uniquely determined.[149]

Secondly, the criteria identified in *Oakes* are themselves indeterminate and do not avoid the intervention of judicial choice and discretion in Section 1 analyses. The first and fourth criteria clearly do not avoid judicial choice and discretion – indeed they invite it. Whether or not the purpose of legislation is "sufficiently significant to warrant overriding a constitutionally guaranteed right," and whether its importance out-weighs the "deleterious effects" of a

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[148] See *Black* v. *Alberta Law Society* (1986), 27 (4th) 527 (Alta. C.A.) where Kerans J. argues for a different set of criteria for applying section 1 than that established in *R.* v. *Oakes*, *supra*, note 101.

[149] In what sense, for example, does a stringent standard of justification follow necessarily from the "fundamental principles of a free and democratic society" as defined by the Court? To reach this conclusion the Court must assume these "fundamental principles" require that it be difficult for the government to justify under section 1 legislation which infringes a right or freedom. The difficulty with this assumption is that the "fundamental principles of a free and democratic society" could just as easily be understood as requiring judicial deference to decisions of the legislature and, therefore, a lax standard under section 1. Indeed, the Court refers to "faith in social and political institutions which enhance the participation of individuals and groups in society" as a "fundamental principle." Such "faith" would appear to cut in favour of judicial deference, not intervention. As we shall see below, the Court often calls for a deference to legislative choice in the name of democracy. Thus, the need for a stringent standard of justification under section 1 – one that places a difficult hurdle in the way of governmental justification of a limit on a right or freedom under section 1 – does not follow in any obvious or necessary way from the "fundamental principles of a free and democratic society." See P. Monahan & A. Petter, *supra,* note 144 at 104.

particular measure, are matters of opinion not legal necessity. The explicit policy orientation of these questions is likely responsible for the Court's reluctance to rely on them as justifications for not upholding legislation under Section 1. With respect to the first, the Court has confidently found, in each case it has applied this criterion, that the "sufficient importance" of the legislation in question was "self-evident."[150] And the balancing of legislative objective against effects contemplated by the fourth criterion has been avoided by the Court as a ground for not upholding legislation under Section 1.[151]

The second and third criteria in the *Oakes* test, on the other hand, have played a central role in the Court's reasons for striking down legislation in a number of cases. Both these criteria concern the relationship between the means chosen by the legislature and the objective of the legislation. The requirement of means/ends proportionality has the appearance of technical and scientific objectivity. The question is simply one of fit: is there a sufficiently tight fit between the means and the end? Accordingly, these criteria are more able to sustain the appearance of constraint than the first and fourth criteria.[152] Once again, however, the appearance of constraint is illusory. In determining whether or not a legislative measure fits the purpose it was designed to achieve, the courts cannot avoid making controversial choices concerning the wisdom and desirability of the legislation. In the first place, the terms of the criteria – "rationally connected" and "impair as little as possible" – are indeterminate. Clearly, people will differ on how connected the means and the ends must be to qualify as constituting a rational connection, or on how little a legislative measure must impair a right

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[150] See *R.* v. *Oakes*, *supra*, note 101 at 229; *Dolphin Delivery*, *supra*, note 2 at 188; *R.* v. *Edwards*, *supra*, note 125 at 42; *B.C. Motor Vehicle Reference*, *supra*, note 108 at 563; *R.* v. *Jones* (1986), 69 N.R. 241 at 255. Note that in *Big M*, the Court found the purpose was illegitimate on federalism grounds and therefore the legislation could not be protected under section 1. "Legitimacy" and "importance" are understood by the Court as different inquiries: see *Regina* v. *Big M*, *supra*, note 101 at 366.

[151] The fourth test is, of course, applied when legislation is upheld under *Oakes* because of the necessity of satisfying each criterion. Even in these situations, however, the Court deals with it very quickly and then moves on: see *R.* v. *Edwards*, *ibid.*

[152] McWhinney, *supra*, note 26 at 223; Monahan, *supra*, note 117 at 66-67; and Beatty, *supra*, note 117.

or freedom before it is said to impair that right or freedom "as little as possible."[153]

Furthermore, the way the Court characterizes the purpose of a legislative provision will tilt the argument about means/ends proportionality in one direction or the other. The tightness of the fit between means and ends will inevitably depend on the level of generality at which the purpose is defined. If the purpose is tautologically equivalent to the legislative provision, then there will be an absolute fit — no other provision would be capable of achieving the purpose. On the other hand, if the purpose is defined in general and abstract terms, while the legislative provision is very specific, the fit will appear much looser. None of this would be a problem if there were some determinate source for identifying the purpose of a given legislative provision. The difficulty, however, is that the characterization of the purpose of a legislative provision is itself a discretionary exercise. The Court might refer to any number of sources in support of a particular characterization — legislative records, counsel for the government, pre-legislative reports, the preamble to the Act, a construction of the whole Act or a particular part of it, et cetera.[154] Within and among each of these it will be possible to find support for a multiplicity of characterizations of legislative objective. And there is no source for determining which of these is uniquely correct.[155]

In *R.* v. *Edwards Books and Art*,[156] for example, the Court characterized the purpose of Sunday closing legislation in different ways at different points in the judgement. Altogether there were

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[153] See Monahan, *ibid.* at 62-71 and S. Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25 Osgoode Hall L.J. 1.

[154] The Court relied on a number of sources to determine what was the purpose of the provision: "the title and text of the *Act*, the legislative debates and Ontario Law Reform Commission's Report on Sunday Observance Legislation (1970)."

[155] This type of argument is developed in Note, "Legislative Purpose, Rationality and Equal Protection" (1972) 82 Yale L.J. 123. See also P. Monahan & A. Petter, *supra*, note 144; H. Ely, "Legislative and Administrative Motivation in Constitutional Law" (1970) 79 Yale L.J. 1205 at 1237; S. Peck, *supra*, note 153 at 72; and J.W. Torke, "The Judicial Process in Equal Protection Cases" (1982) 9 Hastings Constitutional L.Q. 279 at 292.

[156] *Supra*, note 125.

four characterizations of the legislative purpose: 1) to enforce a uniform day of rest for as many as people as possible;[157] 2) to enforce a uniform day of rest for workers;[158] 3) to enforce a uniform day of rest for retail workers;[159] 4) to enforce a uniform day of rest for retail employees and firms with fewer than 8 employees and fewer than 5,000 sq. ft. of floor space.[160] The fourth characterization of purpose is equivalent to the terms of the provision itself.

The Court decided that the legislative scheme impaired religious freedom "as little as possible." In coming to this conclusion, it acknowledged that an alternative legislative scheme, proposed by the appellant, and admittedly less restrictive of religious freedom, would have served the purpose of protecting Sundays off for retail workers (number 3 above). It would not, however, in the Court's view, *have served the purpose of protecting Sundays off for those retail workers who were protected by the scheme currently in place.* According to Dickson C.J.C, speaking for the majority : "What concerns me ... is the limitation of [the alternatives] *scope* in terms of the *employees* who would be denied the benefit which the Act was designed to provide them."[161] In other words, the alternative scheme did not do what the current scheme did. Implicit in this reasoning is the assumption that the purpose of the current scheme was to do exactly what it did: enforce a uniform day of rest for retail employees and firms with fewer than 8 employees and fewer than 5,000 sq. ft. By choosing to define the provision's purpose in tautological terms the Court ensured a perfect fit between means and ends, and effectively ruled out the possibility of *any* alternative scheme fitting the purpose. Manipulation of the characterization of legislative purpose was used in *Edwards* to justify upholding the

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[157] *Ibid.* at 24.

[158] *Ibid.* at 20-21.

[159] *Ibid.* at 23.

[160] As we will see, *infra*, this was the ultimate characterization of purpose.

[161] *Ibid.* at 48.

relevant legislation under Section 1; it can just as easily be used to justify not upholding legislation under Section 1.[162]

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[162] In *Regina* v. *Oakes*, *supra*, note 101, the Court refused to uphold under section 1 a provision of the Narcotics Control Act requiring that a person found in possession of any quantity of marijuana establish at trial, on pain of conviction for trafficking, that he or she did not intend to sell marijuana. According to the Court the provision violated the Charter's guarantee of the presumption of innocence by shifting the burden of proof of intent to traffic from the Crown to the accused, and because there was no "rational connection" between the provision and the purpose of the legislation, the violation was not justified under section 1. In characterizing the purpose of the legislative provision in question, the Court chose not to follow the Crown's formulation. The Crown had argued that the purpose of the provision was "curbing drug trafficking by facilitating the conviction of drug traffickers." *Ibid.* at 228. When the Court formulated the purpose, however, it dropped the second clause. According to it, the provision's purpose was to "[protect] our society from the grave ills associated with drug trafficking." *Ibid.* at 229. Thus, under the Court's formulation, the reverse onus provision had to fit the purpose of "curbing drug trafficking." Under the Crown's formulation, on the other hand, the reverse onus provision would have had to fit the purpose of "curbing drug trafficking" by facilitating the conviction of drug traffickers.

The gist of the Court's argument was that the reverse onus provision was not rationally connected to the purpose of curbing drug trafficking because its operation could lead to convictions for drug trafficking of people who were in possession of narcotics but had no intention to sell them. A person could be accused of possession, and then, unable to demonstrate she had no intention to traffic, she would be convicted of trafficking when, in fact, she had no intention to traffic. The provision was, according to the court, "overinclusive and could lead to results in certain cases which would defy both rationality and fairness." *Ibid.* at 229. The Court emphasized that the aim of "curbing drug trafficking" was not served by punishing non-drug traffickers for drug trafficking. Accordingly, the reverse onus provision was not, in the Court's view, rationally related to curbing drug trafficking. The Court's logic cannot, however, account for the effectiveness of the reverse onus provisions in pursuing the purpose of the provision as formulated by the Crown: namely, curbing drug trafficking by "facilitating the conviction of drug traffickers." Whatever might have been the effect of the provision on non-drug traffickers, there was a strong argument in favour of its effectiveness in making the conviction of people who *did* intend to traffic easier. Reverse onus provisions relieve the Crown of having to prove a difficult element of the offence and thereby make it quicker, easier and cheaper for it to secure a conviction. See Sheldrick, "Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses" (1986) 44 U.T. Fac. L. Rev. 179 at 202-03. That the provision caught non-traffickers as well as traffickers – the gist of the Court's argument – begs the question of whether or not it made it easier to convict traffickers. If you want to catch more big fish, you widen your nets, even though this might entail catching more little fish as well. The Court did not meet this argument. In defining the purpose of the provision as it did, the Court had severed the connection between "curbing drug trafficking" and "facilitating conviction." Thus it did not consider the relationship between the provision and "curbing drug trafficking" with reference to the effect of the provision on facilitating "the conviction of drug traffickers." It concentrated, instead, on how the provision operated in the individual case, arguing, as we saw above, that convicting a particular individual of trafficking when she was not a trafficker, was not rationally related to curbing drug trafficking. See P. Monahan & A. Petter, *supra*, note 144 at 102-25.

III.

Our analysis of constitutional argument in *Charter* decisions has, to this point, concentrated on examples where the Court, or commentators, have argued for the legitimacy of judicial review on the ground that constitutional decisions are determined by the provisions of the constitution and the purposes supposedly underlying them. I would now like to return to the second type of legitimation argument identified at the outset of this essay, and manifest in the early writings of Bora Laskin : namely, "trust" in judicial policy-making. Trust-based arguments reject the possibility of constitutionally determined answers to questions that arise in constitutional adjudication. They accept judicial policy making as a necessary, and desirable, aspect of constitutional adjudication and do not pretend the constitution constrains judicial choice and discretion. The role of the judge is to articulate the competing interests involved in a constitutional dispute, to balance these against one another, and then decide which interest ought to prevail, by impartially and reasonably evaluating the potential consequences of deciding one way or the other. The legitimacy of judicial review within this approach is grounded, as we have seen, in trust in, rather than denial of, judicial choice.[163] This type of analysis is illustrated by the majority decisions in *R.* v. *Jones*[164] and *Dolphin Delivery.*[165]

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[163] For a contrast of "ad hoc balancing" and "per se rules" techniques in American constitutional law, see Note, "Civil Liabilities and the First Amendement" (1969) 78 Yale L.J. 842. See also: Frantz, "The First Amendment in the Balance" (1962) 71 Yale L.J. 1424; Mendelson, "On the Meaning of the First Amendment: Absolutes in the Balance" (1962) 50 Cal. L. Rev. 821; and Tushnet, "Anti-Formalism in Recent Constitutional Theory" (1985) 83 Mich. L. Rev. 1502. See also Michelman, "Forward: Traces of Self-Government" (1986) 100 Harv. L. Rev. 4. Michelman argues that balancing is preferable to the "generality of ... formulas, ideally abstracted from all divisive contingencies of actual social life." *Ibid.* at 30. It escapes the "comforts of legal abstraction." *Ibid.* at 33. The balancing technique is desirable because of its openness, its particularity, and its not attempting to colonize the future by establishing fixed rules. *Ibid.* at 34. It commits the judge to practical reason and affirms rather than denies the judge's responsibility for decision making. *Ibid.* at 35. See also: Lyon, "The Teleological Mandate of the Fundamental Freedoms Guarantee: What to Do With Vague But Meaningful Generalities" (1982) 4 Sup. Ct. L. Rev. 57 at 58, 69, 72, 73; and D. Kennedy, "Form and Substance in Private Law Adjudication" *supra*, note 1.

[164] *R.* v. *Jones*, *supra*, note 150.

[165] *Supra*, note 2.

In each of these, the majority proceeded by articulating the particular interests of the individual and government at stake in the dispute, and determining the outcome on the basis of which interest was weightier.

In *Jones* the Court upheld a legislative provision requiring parents to send their children to public school unless they obtained a certificate from the education authorities certifying that their children were receiving sufficient education at home or elsewhere. The accused educated his children, along with a number of other children, in the basement of a fundamentalist church of which he was the pastor. He alleged that the Act violated his religious freedom as guaranteed by the *Charter*. By requiring him to apply to a secular school board for certification, he argued, the Act compelled him to acknowledge that his authority over his children, and his duty to attend to their education, came from the state and not from God. The majority dismissed the appeal. In its reasons for decision, it did not even pay lip service to the purposive approach. It made no attempt to ascertain the principles and values the guarantee of freedom of religion was meant to serve, nor did it rely on its earlier elaboration of these in *R.* v. *Big M.* Rather, the majority concentrated on articulating the interest of the applicant which had been impaired by the legislation and the degree of its impairment. It concluded that the *Act* "constitute[d] some interference with the appellant's freedom of religion," since the appellant had "an interest in, and a religious conviction that he must himself provide for the education of his children."[166] However, the majority considered the degree of the infringement of the appellant's religious freedom to be "minimal" and "peripheral."[167]

Having defined the appellant's interest and the degree of its impairment the court turned to the competing interest of the state "in the education of its citizens."[168] This interest, in contrast to the "minimal" and "peripheral" interest of the individual, was considered

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[166] *Supra*, note 101 at 251.

[167] *Ibid.* at 255. "Such a requirement constitutes a minimal, or as the trial judge put it, peripheral intrusion on religion."

[168] *Ibid.* at 252.

by the majority to be "compelling."[169] The legislature should have, according to the majority, "without further demonstration,"[170] been able to impose reasonable limits on the appellant's interest in advancing the state's interest in education: "Section 1 of the Charter allows for this."[171] The majority easily reached the conclusion that the state's interest in education outweighed the appellant's interest in freedom of religion. In reaching this conclusion, the majority was not at all concerned with whether there was a sufficient fit between the object of the legislation and the measure in question. Indeed, it entirely ignored the steps in the *Oakes* proportionality test and proceeded by simply "weigh[ing] the competing interests"[172] of the individual and the government against the general standards of "reasonableness" and "demonstrable justification" articulated in Section 1.

The contrast between the balancing type of argument used by the majority in *Jones* and the approach used by members of the Court in the cases discussed in Part II is vividly illustrated by comparing the reasons of the majority to Wilson J.'s dissent. Wilson J. affirmed the two basic tenets of the standard constraint-based *Charter* argument. First, she insisted that it was necessary to give content to freedom of religion through purposive analysis. She pointed out that the "core" of freedom of religion had been defined by the Court in *Big M* and included, at a minimum, "the right to manifest religious belief ... by teaching and dissemination."[173] The purpose of freedom of religion was, however, limited to protecting individuals only from *substantial* interference with their religious freedom and, therefore, it did not protect the appellant in the present case. Secondly, Wilson J. reasserted the need to apply section 1 on the basis of the regime established in *Oakes*. As a reminder to a majority which appeared to have forgotten about *Oakes*, Wilson J. noted that: "[t]here has to be a form of

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[169] *Ibid.* at 253.

[170] *Ibid.*

[171] *Ibid.*

[172] *Ibid.* at 254.

[173] *Ibid.* at 269.

proportionality between the means employed and the end sought to be achieved."[174]

A "balancing" approach was again used by a majority of the Court in *Dolphin Delivery*. In that case the majority determined that the Charter's guarantee of freedom of expression did not protect secondary picketing – picketing by employees of a business which did business with the employer but was not directly involved in the labour dispute between the employer and employees – from a court ordered injunction.[175] As in *Jones*, the majority was more concerned with weighing competing interests than defining the purpose of freedom of expression and then applying it to the facts. It was content to say that "[t]here is ... always some element of expression in picketing" and that "the picketing sought to be restrained would have involved the exercise of the right of freedom of expression."[176] The competing interests in favour of curbing freedom of expression in this case were, according to the majority, "pressing and substantial."[177] Again, as in *Jones* the majority did not apply the means/end proportionality test that had been established in *Oakes*. Rather, it simply noted that "[a] balance between the two competing concerns must be found."[178] The majority concluded that the public's interest in being protected from the adverse effects of picketing outweighed the union's interest in free expression. Accordingly, it held the injunction should be sustained under section 1.[179] Again, Wilson J. was bothered by the way the majority had

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[174] *Ibid.* at 274.

[175] The Court decided the case on the basis of s.32 and pointed out that it was not necessary to deal with Sections 2 and 1. Nonetheless, the Court did deal with these sections, possibly to indicate it would have decided against the union even if the union had won on s. 32.

[176] *Supra*, note 2.

[177] *Ibid.* at 188.

[178] *Ibid.* at 189.

[179] The Court was clear that it had departed from the proportionality test. After describing the balancing process, the Court stated that the requirement of proportionality was *also* met. *Ibid.* at 190. It did not, however, make any serious attempt to argue why the test was met.

proceeded in its section 1 inquiry. She was concerned that "no objective criteria for the s.1 inquiry [had] been identified."[180]

When courts engage in open balancing of interests, and abandon constraint-based reasoning, they rely implicitly on trust, as a basis of legitimacy for their decisions. I want to suggest, however, that as a formal ground for the legitimacy of judicial review trust is at least as problematic as the constraint-based arguments examined earlier. There is little reason to trust judges' determinations of what are reasonable or fair solutions to controversial and vexing political issues in society. Indeed, there is much to support considerable distrust. As Peter Hogg has pointed out:

> [The judiciary's] background is not broadly representative of the population: they are recruited exclusively from the small class of successful, middle-aged lawyers; they do not necessarily have much knowledge of or expertise in public affairs, and after appointment they are expected to remain aloof from most public issues.[181]

Judges operate at or near the centres of social, economic and political power in society, and within an institutional framework committed to preserving and perpetuating the social and economic order as it exists.[182] The perspective judges bring to decision-making – no matter how neutral and impartial they attempt to be – will be shaped by the social grouping they are a part of and the enterprise they are engaged in. As members of an elite class engaged in a fundamentally conservative enterprise, their perspective will be radically different than that of other, and particularly non-elite classes in society.[183]

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[180] *Ibid.* at 200.

[181] *Supra*, note 87 at 98.

[182] J.A.G. Griffiths, *The Politics of the Judiciary* (Glasgow: Fontana Press, 1981); R. Miliband, *The State in Capitalist Society* (London: Quartet Books, 1973); and A. Petter, *supra*, note 144.

[183] The "legal perspective," i.e., that of judges and other members of the legal elite, is the perspective of the ruling classes in society and interprets the world, for the most part, in terms of the interests of those classes. The experience of oppression by those who are not members of the ruling classes - for reasons of gender, race, class, sexual orientation, or other characteristics that differentiate them from these classes - are not part of this perspective: their history, custom, traditions do not count within in. Accordingly, the elite perspective encoded in the world view of judges lends to an impoverished understanding of domination and oppression at best, and, at worst, a denial that it exists and its further entrenchment. Some of the readings I have found helpful in exploring these ideas are (and this list is far

Because of their personal attributes and institutional ethos, judges can be relied upon to interpret social phenomena and legal materials from the standpoint of the dominant groups in society with whom their professional discipline has historically been allied. In this sense, the judiciary is presumptively partial. Martha Minow has argued that the natural tendency of the courts will be to reinforce "dominant cultural forms," the illusion of one reality[184], taking at face value ideas like "individual choice and community consensus:"[185] "... if we seek to be understood, let alone to succeed, in a court of law, we must fit our claims into existing doctrine, even if that doctrine uses white middle class men as its reference point."[186] In short, the dominant perspective assumes "the idea that critical features of the *status quo* — general social and economic arrangements — are desirable."[187] Similarly, Paul Brest has noted judges are part of the "dominant national alliance," an alliance representing the interests of elites, and, for that reason, "judges' attitudes on important social and political issues do not reflect those of the population at large."[188] While I do not doubt the sincerity of judges who endeavour to rise above partisanship, nor the possibility of occasional progressive decisions, it would be unrealistic to expect judges to "be independent

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from exhaustive): Scheingold, *The Politics of Rights* (New Haven: Yale University Press, 1974); Bell Hooks, *Feminist Theory* (Boston: South End Press, 1984); C. Sumner, *Reading Ideologies*, *supra*, note 130; J.A.G. Griffiths, *The Politics of the Judiciary*, *ibid.* Bell, *And We Are Not Saved* (New York: Basic Books, 1987); Freeman, "Antidiscrimination Law: A Critical Review" in Kairys, ed., *The Politics of Law* (New York: Pantheon Books, 1982); R. Miliband, *ibid.*; J. Fudge, "Labour, the Constitution and Old Style Liberalism" (1988) 13(2) Queen's L.J. 61; Freire, *Pedagogy of the Oppressed* (New York: Continuum, 1970); M. Kline, "Race, Racism and Feminist Legal Theory" [forthcoming, Harv. Women's L.J.]; Hutchinson, *Dwelling on the Threshold* (Toronto: Carswell, 1988); A. Hunt, "The Critique of Law: What is 'Critical' about Critical Legal Theory" (1987) 14 J. of L. and Soc. 5; M. Mandel, "Dworkin, Hart and the Problem of Theoretical Perspective" (1979) 14 L. and Soc. Rev. 57; S. Martin & K. Mahoney, *supra*, note 130; P. Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (1986) 2 Can. J. Women L. 159; Minow, "Forward: Justice Engendered" (1986) Harv. L. Rev. 10; and P. Brest, "Interpretation and Interest" (1982) 34 Stan. L. Rev. 765.

184 *Ibid.* at 69.

185 *Ibid.* at 68.

186 *Ibid.* at 65.

187 *Ibid.* at 54.

188 P. Brest, "Who Decides?" (1985) 58 S. Cal. L. Rev. 661 at 669.

of the multitude of influences, notably of class origin, education, class situation and professional tendency, which contribute as much to the formation of their view of the world as they do in the case of other men."[189] One does not easily step outside of, nor transcend such influences. Beliefs are not chosen, they are held: "... the interpreter is embedded in a structure of beliefs of which his judgments are an extension."[190]

Thus, it is unclear why we should trust, and privilege over any other, the value judgements of an elite group of predominantly white, upper middle class, male lawyers.[191] Why, for example, should we trust the majority of the Court in *Dolphin Delivery*[192] to balance the free expression involved in picketing against the "public interest?" In that case, the majority took a traditional and narrow perspective on industrial conflict, arguing that the fundamental tenet of collective bargaining was the idea that "parties themselves should, wherever possible, work out their own agreement;"[193] and that "industrial conflict may be tolerated by society but only as an inevitable corollary of the collective bargaining process."[194] Therefore, little weight was attached to secondary picketing, which, by definition, extends beyond the dispute between primary parties. From other perspectives, for example, that of the labour movement, however, secondary picketing might appear very weighty – or at least weighty enough to outweigh the "public's interest" in containing picketing.[195]

Indeed, the majority's assumption that there was a conflict between secondary picketing and the public interest itself reveals the partiality of its perspective. One could argue plausibly, for example, that the public has a strong interest in having powerful and effective

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189 R. Miliband, *supra*, note 182 at 124.

190 S. Fish, "Wrong Again" (1983) 62 Tex. L. Rev. 299 at 312.

191 *Supra*, notes 182, 183 and 188.

192 *Supra*, note 2.

193 *Ibid.* at 189.

194 *Ibid.*

195 For a general discussion of secondary picketting , see D. Beatty, "Secondary Boycotts: A Functional Analysis" (1974) 52 Can. Bar Rev. 388.

labour unions. The majority of the "public" are, after all, workers, not owners and managers, and unions provide benefits to and protection of workers that would be unavailable to them without the representation, or at least the presence, of strong and effective unions. Defining "public interest" as including strong and effective unions would inevitably put a different spin on the question of whether enjoining secondary picketing served or impaired the public interest. Allowing secondary picketing as a means of empowering unions might then be portrayed as serving, rather than impairing, the public interest.

The example demonstrates that the majority of the Court has a particular point of view on labour relations — one that is neither empathetic nor sympathetic to the interests of organized labour. Obviously, judges have points of view on most of the issues they must decide. As Petter points out, however, "there would be less reason for concern on this score if the courts had an equal understanding of, and empathy for, the problems of all segments of Canadian society." The difficulty is that, because of the composition and institutional role of the courts, such empathy is lacking. And the absence of empathy undermines the argument that decisions of the courts under the *Charter* are legitimate because of the trustworthiness of judges. Trust in an institution is normally based on the institution's capacity to empathize with the person or group doing the trusting. It is, therefore, a weak ground for legitimating the outcomes of constitutional adjudication.

The argument is often made that explicit interest-balancing is preferable to more legalistic forms of decision-making in spite of the difficulties discussed above. Open interest balancing, it is argued, allows for a more honest and open adjudicative process and leads to decisions more in tune with social and economic reality.[196] With respect to the first of these, it is important to understand that interest balancing can be just as obfuscating as more "legalistic" forms of decision-making. Before two interests can be weighed, they must be characterized. The particular characterization of an interest is usually portrayed as self-evident and uncontroversial. Yet,

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[196] F. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Col. L. Rev. 809 at 820-22 and 838-42; Laskin, *supra*, notes 30 and 31; Lederman, *supra*, note 71; and Michelman, *supra*, note 163.

competing interests can be made to look more or less important in relation to one other depending on how the Court defines their respective levels of generality.[197] One interest can be portrayed as "highly generalized and obviously crucial," while the other is cast as a "rather particular and narrowly conceived claim."[198] Thus, even before the interests are weighted and balanced against one another the Court can create a strong inertia towards one interest or the other.

In *Jones*,[199] for example, the court articulated the respective interests of the complainant and the government at radically different levels of generality. The government's interest was articulated as the "efficient education of the young."[200] The complainant's interest was stated as a desire on his part to refrain from acknowledging "that the government, rather than God, [had] the final authority over the education of his children."[201] In other words, the government's interest was articulated as education in general, rather than the enforcement of a particular policy within the education system, while the individual's interest was deemed a particular aspect of freedom of religion rather than freedom of religion in general. The level of generality at which one interest was articulated was exactly the opposite of the level of generality at which the other was articulated. The government's interest was portrayed as "highly generalized and obviously crucial," while the individual's was cast as a "rather particular and narrowly conceived claim." It was thus made easier for the Court to find that the government's interest outweighed that of Mr. Jones.[202]

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197 C. Fried, "Two Concepts of Interests: Some Reflections on the Supreme Courts Balancing Test" (1963) 76 Harv. L. Rev. 755.

198 *Ibid.* at 763.

199 *Supra*, note 164.

200 *Ibid.* at 255.

201 *Ibid.* at 250.

202 The importance of how the competing interests are articulated is illustrated by flipping the relative levels of generality and particularity of the government's and the individual's interests in *Jones*. Suppose the Court had characterized the government's interest as a particular aspect of its more general interest in education: namely, its interest in ensuring that the applicant (and possibly others similarly situated) complied with the requirement of

The second argument in favour of explicit interest balancing is that it ensures a decision in tune with social and economic circumstances by enabling the judge to take account of all the relevant facts and interests raised by a particular constitutional dispute. The difficulty with this argument is that it just will not be possible for the court to base its decision on a complete picture of the factual context and all the interests at stake. These will extend far beyond the restricted setting of the case to factors beyond the court's comprehension and imagination.[203] The problem is made visible by just scratching the surface of the Court's reasons in *Dolphin Delivery*. Even if we accept the Court's understanding of the public interest, it does not follow, as the Court believed it did, that protecting the power of courts to issue labour injunctions in cases of secondary picketing would promote "industrial peace." One could argue, for example, that the use of labour injunctions to enjoin picketing has the effect of exacerbating tensions between labour and management, prolonging strikes, inciting violence, *et cetera*. Labour injunctions are not happily accepted by unions, and their use, whether in primary or secondary picketing, might do more harm to the prospect of industrial peace than good.[204] In short, there is little reason to assume along with the Court that upholding the power of courts to issue labour injunctions to enjoin secondary picketing would promote, rather than detract from, the public's interest in labour peace.

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applying for a certificate to educate his children outside the public schools. And, suppose the Court had characterized the appellant's interest in general terms: namely, his interest in freedom of religion. Now, the government's "particular and narrowly conceived claim" in a minor and limited exception to its policy of requiring applications for certificates would have to be balanced against the appellant's "highly generalized and obviously crucial" interest in freedom of religion. The tilt would now be in the opposite direction. The scales would be weighed in favour of the appellant.

[203] See Tushnet, *supra*, note 163.

[204] The enforcement of labour injunctions, whether judicially or legislatively mandated, is, of course, carried out by the police. Injunctions, thus, have the effect of turning peaceful demonstrating and picketing into violent confrontations between police and workers. See S. Fine & R. Millar eds, *Policing the Miners' Strike* (London: Lawrence and Wishart, 1985).

IV.

The above analyses support conclusions that judges make controversial policy decisions in constitutional adjudication and that there are no good reasons for us to trust them in doing so. The two formal grounds for the legitimacy of judicial review, truth and trust, do not hold up upon close scrutiny. It is now necessary to deal with a further type of legitimation argument that might be said to follow from the critiques of the other two. I will call this the restraint argument. This type of argument accepts as a matter of fact that judges make policy decisions in constitutional adjudication, and prescribes on this basis that they defer to the legislature which is democratically accountable and, therefore, more deserving of trust, as well as more constrained (by the ballot box), than the judiciary. Obviously, it can only be used to justify decisions upholding legislation. Numerous variations on this argument have been advanced by commentators,[205] and it has provided the Court with a convenient justification for upholding legislation in a number of instances.

In the *Alberta Reference*,[206] for example, the majority opinions of LeDain J. and McIntyre J. emphasized that labour relations was a "field" "involving a balance of competing interests"[207] that was "delicate," "dynamic and unstable," and upon which "the public at large depend[ed] for its security and welfare."[208] The balancing of interests in this area should have, in their view, been left to the "freely elected legislature and to parliament."[209] Constitutionalizing the right to strike, and therefore prohibiting legislation banning

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[205] Hogg, *supra*, note 87 at 99; G.V. LaForest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983) 61 Can. Bar Rev. 19 at 25-26; S. Fairley, "Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review" (1982) 4 Sup. Ct. L. Rev. 217 at 231-54; M. Gold, *supra*, note 94; and R.A. MacDonald, "Postscript and Prelude – The Jurisprudence of the Charter: Eight Theses" (1982) 4 Sup. Ct L. Rev. 321 at 346; Also, see *infra*, notes 227, 230 and 231 and accompanying text.

[206] *Supra*, note 96.

[207] *Ibid.* at 240.

[208] *Ibid.* at 233.

[209] *Ibid.* at 237.

strikes, would have involved the Court in substituting its judgement for that of the legislature.[210] Similarly, in *R.* v. *Edwards Books and Art*,[211] Dickson C.J.C., writing for the majority, characterized the question of deciding who was exempt from a general Sunday closing requirement as one involving "balancing ... an indirect burden on the religious freedom of a retail store owner against the interests of his or her perhaps sometimes numerous employees."[212] He insisted, however, that the Court could not question the balance struck by the legislature because the issue of where the line was to be drawn between the competing interests involved was discretionary.[213] The Court was unwilling "to substitute judicial opinion for legislative ones as to the place at which to draw a precise line."[214] LaForest J. emphasized in a concurring opinion that the area of Sunday closing was one involving the operation of "sociological and economic forces"[215] and "many competing pressures"[216] involving "choices the Court is not in a position to make."[217]

The difficulty with the restraint type of argument is this: nobody is willing to claim that the courts should defer to legislative judgement in all cases, but there is no uncontroversial way to draw a line between those cases where deference is appropriate and those where it is not. The very question of deciding whether an area is "political," and therefore one which calls for judicial restraint, is political.[218] As one commentator has observed: "Self-restraint is

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[210] *Ibid.*

[211] *Supra*, note 125.

[212] *Ibid.* at 47.

[213] *Ibid.* at 49.

[214] *Ibid.* at 51.

[215] *Ibid.* at 68.

[216] *Ibid.* at 67.

[217] *Ibid.* at 68.

[218] S. Wright, *supra,* note 115:

> Unfortunately, judicial activism and judicial restraint are terms whose meanings metamorphosize with each commentator. "Activism" to the Warren Court critics was everything that they deplored in judges, whereas "restraint" to the new judicial

easily turned on or off."[219] Why is it that labour relations[220] provincial Sunday closing legislation,[221] criminal procedure[222] and language rights[223] are too political for the Court to touch, while anti-combines legislation,[224] abortion[225] and the testing of cruise missiles[226] are within the purview of judicial scrutiny? Commentators are no more consistent in their calls for restraint than is the Court. Paul Weiler has argued that division of powers issues are "political" and therefore require a deferential posture on the part of the Court, while at the same time arguing that it is proper for the Court to take an activist stance under the Charter.[227] Patrick Monahan, on

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right is synonymous with principled decision making.

Ibid. at 489.

> Once we acknowledge that the Constitution appropriately constrains the choices of the representative branches of government in some cases, we can no longer maintain that the sheer number of times that the courts rule legislative enactments unconstitutional says much about whether the courts are doing their job right. The criticism has got to be that the courts are overruling majoritarian choices in the wrong situations rather than simply too often. But this criticism demands some criteria for determining the "right" situations for invalidating majoritarian choices other than, for example, a rule like "no more frequently than once a year."

Ibid. at 491. See also: Fudge, *supra*, note 183 at 75; F. Rodell, *Nine Men: A Political History of the Supreme Court from 1790-1955* (New York: Random House, 1955) at 19-20; and Michelman, *supra*, note 163.

[219] G. Braden, "The Search for Objectivity in Constitutional Law" (1947-1948) 57 Yale L.J. 571.

[220] *Alberta Reference*, *supra*, note 96.

[221] *Big M*, *supra*, note 101 and Edwards, *supra*, note 125.

[222] *R.* v. *Mills*, *supra*, note 96.

[223] *Societe Des Acadiens Du Nouveau-Brunswick Inc.* v. *Association of Parents for Fairness in Education*, *supra*, note 76.

[224] *Hunter* v. *Southam*, *supra*, note 96.

[225] *R.* v. *Morgentaler*, *supra*, note 96.

[226] *Operation Dismantle*, *supra*, note 108.

[227] P. Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 U. of Mich. J. of L. Rev. 51.

the other hand, understands federalism adjudication as relatively devoid of political content, while emphasizing that, in *Charter* cases, "The Court ... is a political actor, making political choices between competing social values,"[228] and, accordingly, should develop "techniques of judicial deference precisely so they might avoid being faced with ... essentially legislative determinations."[229] The basis of these claims, and the claims by the Court looked at above, is that judges, can be "activist" in some areas, while they must be "restrained" in others. Yet, there is no apparent constraint on, nor reason to trust, judges, or commentators, in characterizing a particular area one way or the other.

A second difficulty with the restraint argument is that it presumes priority should be given to the democratic *process* over all other values. The value of a given substantive judicial outcome requiring striking down a governmental action is automatically given less weight than the value of preserving the democratic process. Restraint as a prescriptive "theory of judicial review" forces its adherents to laud decisions where the Court upholds legislation they (the adherents) find objectionable on substantive grounds, while condemning decisions striking down such legislation. For example, a person advocating restraint would have to condemn *Morgentaler* and laud the *Alberta Reference* on the grounds that the former manifest judicial interference with the democratic process, and the latter judicial deference to that process. Thus, she would have to attribute more weight to the democratic process than to the desirability of any of the possible substantive results in the cases. In this sense, she would be choosing a balance between competing values with the democratic process winning out over all others. When judges invoke the restraint argument they make the same choice. And it is a choice reflecting political preference.

Defenders of judicial deference to the legislature often argue that expanded judicial power detracts from, rather than advances, human rights and freedoms. This argument rejects the notion that judges should be relied on to protect rights and freedoms as a distortion and misconception in the modern welfare state. According

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[228] *Supra*, note 144 at 77.

[229] *Supra*, note 117 at 98.

to Monahan and Petter: "Where there has been progress towards [social justice] ... the impetus has, with few exceptions, come in the democratic rather than the judicial arena."[230] Furthermore, they and others point to the historical predilections of the courts against the interests of the disempowered. As empirical observations, their points are unassailable. Historically courts have upheld traditional structures of power and domination and, institutionally, they are limited in their capacity to challenge seriously substantive inequality. There are, in other words, good grounds for scepticism about the potential of the *Charter* to usher in a new era of social justice, and to fear its potential for ushering out existing and hard fought for protections of the interests of ordinary people. And, as argued in Part III, we should be sceptical about the claim that the courts can be trusted to make important policy decisions. While these insights are crucial considerations in forming political and litigation strategies around the *Charter* and assessing legitimation arguments concerning judicial review, however, they do not support restraint based arguments as a formal ground of legitimacy. It does not follow that, because courts are unlikely to render progressive decisions under the *Charter*, they act illegitimately when, and if, they do.[231] A

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[230] Monahan & Petter, *supra*, note 144 at 124.

[231] The view that courts should defer to "economic" legislation in constitutional adjudication, for example, originally developed in response to the pro-business anti-regulatory activity of the Courts under the U.S. Bill of Rights (the Lochner era). The restraint argument was thus linked to the substantive politics of particular decisions. That link is, however, absent in much of the restraint rhetoric we find today. The restraint argument is used to legitimate decisions to defer to legislation that is "economic" in form, regardless of its substance. Monahan and Petter, for example, appear to be in favour of deference to "economic" legislation. See *ibid.* at 121-22. Monahan argues that the Court should not intervene in the economy to provide "minimum levels of income, housing and education." Such interference would, in his view, be undesirable because of the historical record of the court in blocking social welfare measures. Monahan's argument appears, however, to derive an "ought" from an "is." He is accurate in his description of the historical record, but it is not clear how that description supports a prescription that the Court continue in that mode. See Monahan, *supra*, note 117 at 126-27. Perhaps the best illustration of the formalization of restraint arguments is *Dandridge* v. *Williams*, 397 U.S. 471 (1970). In that case, the United States Supreme Court refused to strike down a legislative provision for a "maximum grant" of $250 per month per family regardless of family size under the equal protection clause. The applicants claimed that the provision resulted in disparity of grants of welfare payments to large families. The Court stated:

normative prescription of restraint as the only legitimate judicial action under the Charter cannot be derived from a set of empirical observations about the court's historical tendencies.

A third difficulty with the restraint argument is its premise that current "democratic" institutions *are* democratic. Advocating deference to these institutions in the name of democracy implies they are democratic. This is itself a controversial and value-laden judgement. People disagree on the extent the democratic ideal of accountability must be manifest in the actual practices of a political system before the system deserves to be called democratic. Many argue that, because of the unequal structuring of wealth and power in the economies in which "democratic" institutions operate the idea of accountability is little more than a source for rhetorical posturing. The Canadian electoral process, like that of most Western states, requires money, and lots of it, to support candidates, organize pressure groups, campaign, advertise, et cetera. Those individuals and groups with more money are therefore in a better position to determine, who, and what issues, run for election, as well as to provide support for effective campaigning, than those with less. They may also resort to forms of support other than direct contributions to political parties, as evidenced by the advertising campaign supporting the Mulroney trade deal in the 1988 federal election. In short, the "political market" of electoral politics

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> For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the court thought the 14th Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." That era long ago passed into history. In the area of economics and social welfare, a State does not violate [equal protection] merely because the classifications made by its laws are imperfect.... To be sure, [the cases] enunciating this fundamental standard under [equal protection] have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.... [T]he 14th Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.... [The] intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.

Ibid. at 484-87.

functions like other markets in allowing those who have more to get more.

Furthermore, there is the real danger that a party in power will primarily serve the interests of the powerful and organized groups who supported its bid for election: a "tyranny of the minority." If the bulk of the government's power is used to serve a small constituency of powerful supporters, the interests of the majority of people will be ignored and/or sacrificed.[232] Those who argue for restraint often assume, despite all of these difficulties, that current institutional arrangements *are* democratic. Indeed, they suggest judicial review is undemocratic, even if directed at securing social and economic equality for the purpose of making democracy more substantively democratic.[233] Once again, counselling judicial restraint under the constitution is wise strategy (for all the reasons discussed earlier) if one wishes to protect governmental support of disadvantaged and oppressed groups. Prescribing judicial restraint in the name of democratic accountability, however, assumes unquestioningly that there *is* democratic accountability. This assumption is certainly not shared by all and, therefore, cannot provide an uncontroversial basis of legitimacy for judicial restraint in constitutional cases.

V.

In the second part of this paper I challenged the view that the outcomes of constitutional adjudication were determined by the constitution. I argued that the constitutional text, and the purposes and principles supposedly informing it, could not be relied upon to constrain judicial choice and discretion. They were insufficiently precise to direct interpreters to uniquely correct answers to constitutional questions. A number of contemporary legal

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[232] See C.B. MacPherson, *The Life and Times of Liberal Democracy* (Oxford and New York: Oxford University Press, 1977) at 87-88; W.R. Neumann, *The Paradox of Mass Politics: Knowledge and Opinion in the American Electorate* (London, England and Cambridge, Mass.: Harvard University Press, 1986); and R. Parker, "The Past of Constitutional Theory - And Its Future" (1981) 42 Ohio L.J. 223 at 242-43.

[233] See, for an example of such an argument, P. Monahan, *supra*, note 117 at 126-27.

theorists[234] have rejected this type of "indeterminacy" critique[235] on the ground it wrongly assumes objectivity and constraint cannot be achieved in the absence of logical determinacy. Such determinacy may be a formalist's dream, they point out, but notwithstanding its implausibility constitutional interpretation can still be an objective and constrained process. I will call this type of argument the *weak* constraint thesis to distinguish it from the strong constraint thesis (logical determinacy) examined in Part II. As we will see, the weak constraint thesis attempts to establish a middle ground between the view that judges are mere agents of constitutional truths, and the opposing view that judges decide cases on the basis of which result they consider to advance a better policy. In doing so it relies on themes of both constraint and trust.

Writers who argue for the weak constraint thesis usually make three basic points. First, they concede that law is logically indeterminate; that there is often no uncontroversial link between a legal prescription and a judicial result. Rather, they argue, law is a matter of interpretation and interpretation "necessarily entail[s] strong personal elements."[236] Thus, it is inevitable that different interpreters will reach different interpretations of the same legal

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234 J. Williams, "Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells" (1987) 62 N.Y.U. L. Rev. 429; J. Stick, "Can Nihilism Be Pragmatic" (1986) 100 Harv. L. Rev. 332; O. Fiss, "Objectivity and Interpretation" (1981-82) 34 Stan. L. Rev. 739; B. Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law" (1988) 33 McGill L.J. 451; and R. Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986). For applications of Dworkin's "interpretive" methodology to constitutional theory, see D. Beatty, *supra*, note 117; P. Monahan, *ibid.*; and R. Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 52 Harv. L. Rev. 1189.

235 See text at 154-68.

236 O. Fiss, *supra*, note 234.

materials.[237] The interpretation reached by an individual will, at least to some extent, reflect *her* moral and political convictions.[238]

Second, these writers argue that despite all of this, adjudication is objective, constrained and rational. They point out that judges generally internalize, and experience as constraining, a set of values, attitudes, conventions and procedures. These are, to quote Brian Langille, the "structural conditions" or "social rules" or "rules of the game" accepted by judges as a group;[239] Owen Fiss calls them "disciplining rules" and finds their source in the "interpretive community" of judges;[240] and Ronald Dworkin speaks of the judge's "interpretive attitude" – her internalization of a duty to reach legal decisions on the basis of principle rather than desired outcomes.[241] In short, the weak constraint theorists argue that judges approach their task with an *attitude* that enables them to

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[237] See, for example, R. Dworkin, *supra*, note 234: "The interpreter's understanding of what is the purpose of the practice, and what is necessary to achieve it, will ultimately be informed by his personal and subjective views." *Ibid.* at 256. "If the raw data do not discriminate between ... competing interpretations, each interpreter's choice must reflect his view of which interpretation proposes the most value for the practice." *Ibid.* at 52. The interpreter must construct a coherent and purposeful picture of the practice by choosing between competing plausible understandings of it. He must "impose order" (*ibid.* at 273) – coherency – on the apparently chaotic and contradictory raw materials of the practice by making choices on which reasonable people might differ. Dworkin illustrates this with reference to adjudication:

> Hard cases arise, for any judge, when his threshold test does not discriminate between two or more interpretations of some statute or line cases. Then he must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions – its public standards as a whole – in a better light from the standpoint of political morality. His own moral and political convictions are now engaged.... Different judges will disagree about each of these issues and will accordingly take different views of what the law of their community, properly understood, really is.

[238] *Ibid.*

[239] B. Langille, *supra*, note 234.

[240] O. Fiss, *supra*, note 234.

[241] Interpretation is, according to Dworkin, "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong." *Ibid.* at 52. The analyst must understand the practice he is analyzing, such as law, as serving a set of coherent purposes or principles. The rules and details of the practice must then be "understood or applied or extended or modified or qualified or limited in accordance with these purpose or principle." *Ibid.* at 47.

transcend personal interest, and decide cases neutrally and impartially.

The third point made in articulations of the weak constraint argument is that, while legal materials may often allow for multiple and competing plausible interpretations, the range is not infinite. There may not be unique "right answers" to legal questions, but wrong answers can be identified. The requirement that results must be justified by existing legal doctrine ensures a limited range of plausible interpretations. Thus, Langille adopts the view that concepts like contract and property can no sooner be rejected by a lawyer than can the second law of thermodynamics by a physicist.[242] Similarly, Dworkin states that neither a Marxist nor a fascist interpretation of the law could satisfy the requirement of doctrinal justification.[243] In short, the preclusion of radical interpretations is assured.

The crux of the weak constraint thesis, then, is that while law is not logically determinate, adjudication is nonetheless constrained by the institutional and doctrinal structure in which it takes place. Therefore, the argument goes, it is rational and constrained despite the fact interpreters may differ a great deal in their understandings of "indeterminate" legal prescriptions. Most perplexing about the weak constraint thesis is its claim to legitimate the outcomes of constitutional (and other forms of) adjudication. Logical determinacy arguments, though implausible as descriptions of adjudication, at least had an answer to the question of why judicial decisions should be authoritative and obeyed. Legal outcomes were considered legitimate because they supposedly represented the universal truths of the constitution. Weak constraint arguments begin with a more plausible account of the adjudicative process, by rejecting logical determinacy as an adequate description, but have little to offer in support of the legitimacy of the outcomes of that process. Their answer to the problem of legitimacy appears to be that such outcomes are legitimate because of the "impartiality" of the adjudicative process, supposedly engendered by judges adopting an "internal attitude" and thereby experiencing as binding the

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[242] B. Langille, *supra*, note 234 at 503-04.

[243] R. Dworkin, *supra*, note 234 at 408.

professional norms of the judiciary. This argument fails to account, however, for the potential partiality – the "tilt" – of the shared assumptions, values and methodologies that constitute the "interpretive community" or "agreements in judgment" of the judiciary. While these may be internalized and experienced as constraining and authoritative by individual judges, that only ensures judges will reproduce the partiality of the system they are a part of, not that their decisions will be "impartial." The presence of an internal attitude on the part of judges, while potentially allowing for neutrality within the existing values and assumptions of the legal system, tells us nothing about the extent to which those values and assumptions genuinely reflect the interests and perspectives of groups other than the judicial and legal elite.[244] Adoption of the internal attitude is tantamount to a commitment not to question the assumptions of the system from outside the system. The questions of *why* one should adopt an internal attitude or *why* the authority of those who have adopted such attitudes is justified, however, remain unanswered.

One of H.L.A. Hart's central insights was that the presence of an internal attitude and the moral legitimacy of the legal system in which it was held, were separate issues. For Hart, it was both necessary and sufficient for a legal system to exist as a social fact that: 1) the officials of that system internalized the system's rules of recognition; and, 2) the subjects of the legal system were generally obedient to the "primary rules" of the system. The important point was that *only* the officials were required to have an internal attitude toward the rules of the system. The "... rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its [the legal system's] officials."[245] The minimum requirement of the subjects of that system was obedience. And, "they may obey 'each for [their] part only' and from any motive

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[244] P. Brest, *supra*, note 188. This idea is more fully developed in J. Bakan, "Partiality and Legitimacy in Constitutional Theory," presented at the Legal Theory Workshop, Faculty of Law, University of Toronto (8 November 1988). This document is on file at the Osgoode Hall Law Journal.

[245] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 113.

whatever."[246] While in a "healthy society," citizens would have an internal attitude towards the rules of the system, a legal system could exist in the absence of such an attitude. In other words, a legal system could exist even if its subjects did not accept its rules as "common standards of behaviour," and obeyed them only reluctantly and out of fear of sanctions. A legal system could exist in Hart's scheme even if almost the whole population was in a "state of passive and coerced obedience."[247]

Hart accepted the weak constraint thesis as an accurate description of the adjudicative process in a system where officials adopted internal attitudes. He did not doubt that, in the absence of determinate rules, judges did not simply "intrude their personal preferences or blindly choose among alternatives."[248] Quite the contrary, in such cases they still operated within a "working body of rules"[249] which could be formulated in general terms as "principles, policies and standards."[250] And, within this context, there existed a "phenomenology of considered decision: its felt involuntary or even inevitable character."[251] Indeed, for Hart, it was the "agreement in judgement among lawyers" about the rules of the game that made adjudication a "rational process."[252] The crucial message behind Hart's jurisprudence, however, was that from all of this did not a justification make. Hart wanted to leave open the possibility that a legal system could be judged morally, in spite of its internal rationality, and the internal attitude towards its rules of recognition by judicial officials. And he insisted it was necessary to preserve the

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246 *Ibid.*

247 N. MacCormick, *H.L.A. Hart* (London: Edward Arnold Ltd., 1981) at 22.

248 H.L.A. Hart, "Problems of Legal Reasoning" in J. Feinberg & H. Gross eds, *Law in Philosophical Perspective* (Belmont, California: Watsworth Publishing Co., 1977) at 145.

249 *Ibid.*

250 *Ibid.*

251 *Ibid.* at 146.

252 *Ibid.*

external perspective from which such judgements about the system's moral worth could be made.[253]

The difficulty with the weak constraint thesis is that questions about the legitimacy of adjudicative outcomes are raised from the internal perspective only. The legitimacy of the values and assumptions constituting that perspective is taken for granted. Hart's concern with preserving external perspectives is entirely absent. Indeed, writers of the weak constraint school explicitly renounce and marginalize critics who refuse to accept the legitimacy of the internal perspective as a starting premise.[254] Criticism should, in their view, start from the premises of the system that is being criticized. The implicit, and sometimes explicit, claim is that we should trust and accept the values and assumptions judges have internalized. But this brings us back to the difficulties encountered in Part III with the argument that judges should be trusted. There it was argued that because of the close alignment of the judicial perspective with the interests and concerns of dominant groups in society, the judicial perspective is presumptively partial. Therefore, there are no good reasons for groups who do not share those interests and concerns to trust decisions reflecting that perspective. The same critique applies equally here. The "internal perspective" of the legal elite is an insufficient basis for the legitimacy of judicial outcomes when it reflects, as it does, the interests of society's dominant groups to the exclusion of others.

VI.

We have seen that attempts by constitutional jurists to establish formal grounds for the legitimacy of judicial review are ultimately grounded in theories about constitutional truth or trust in the judiciary. Those relying on constitutional truth argue amongst themselves about the correct sources of truth. Some find it within the four corners of the text, others in the alleged purposes of

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[253] *Supra*, note 245 at 206.

[254] R. Dworkin, *supra*, note 234 at viii, 13, 14, 413; O. Fiss, *supra*, note 234 at 748-50; B. Langille, *supra*, note 234 at 499-504.

particular constitutional provisions. The latter group are, in turn, divided on the question of where to look to discover the purpose of the provision: the intentions of the framers, traditional principles of society, current normative consensus, the principles underlying conventional constitutional law, or some combination of these. In contrast to the seekers of constitutional truth, there are, as we have seen, those who understand the search for truth as a futile exercise and ground their claims that judicial review is legitimate in trust in judges. They accept that judges are not constrained by constitutional norms to reach "right answers" and invoke in defense of judicial review the unique attributes of judges and the judicial office — impartiality, moral acumen, and a sense of fairness and decency.

The first three Parts of my discussion attempted to demonstrate the role played by arguments premissed on truth and trust respectively in constitutional discourse before and after the enactment of the *Charter*. In parts IV and V, I looked at two types of argument related to the themes of truth and trust. First, there was the restraint argument. According to it neither truth nor trust are sufficient grounds for the legitimacy of judicial interference with legislative decisions: there are no constitutional truths to constrain judges, and there are no grounds upon which to trust them. Therefore, the argument goes, the only legitimate judicial action in constitutional cases is inaction. Secondly, in Part V, I discussed the weak constraint theory as an attempt to meet the indeterminacy critique developed in Part II. This theory accepts that the constitution is indeterminate, but invokes in defense of judicial review the principled and impartial style of decision making by judges. As we saw, it ultimately relies on trust because it requires unquestioning acceptance of the shared values and assumptions that constitute the judicial perspective.

My aim throughout the paper was to demonstrate the insufficiency of all of these arguments in accomplishing their purpose of establishing formal grounds of legitimacy for judicial review. The idea of constitutional truth is implausible. The questions that arise in constitutional argument are controversial, and the materials relied upon to answer them indeterminate. Interpreters of the constitution, whether judges or anyone else, must make choices and exercise discretion. And the idea of trusting judges to make such choices and exercise discretion is problematic. Notwithstanding sincere

attempts by judges to be impartial, principled and professional, they cannot escape the personal and structural conditions that determine a partial and elite perspective on the questions they must decide. It is not clear why those who do not share that perspective should trust and pay allegiance to decisions that manifest it. Restraint arguments and the weak constraint thesis appear, superficially, to provide ways out of the implausibility of constitutional truths and the unacceptability of trust in judges. As I demonstrated above, however, these arguments raise difficulties similar to those encountered with the other arguments as well as new ones.

To conclude, the project of constructing formal grounds to legitimate judicial review has been a failure. Pursuit of the arguments advanced by constitutional jurists in Canada inevitably leads one to premises that are either implausible or unacceptable when situated in the actual practices and institutions constituting judicial review. Such arguments may be sensible and coherent in the absence of facts about the practice of judicial review, but that does not provide them any weight in legitimating the results of that practice. Accordingly, constitutional argument may best be understood as a call to faith rather than persuasion by reason. Martin Buber has said:

> There are two, and in the end only two, types of faith. To be sure there are very many contents of faith, but we only know faith itself in two basic forms. Both can be understood from the simple data of our life: the one from the fact that I trust someone, without being able to offer sufficient reasons for my trust in him; the other from the fact that, likewise, without being able to give a sufficient reason, I acknowledge a thing to be true.[255]

Within constitutional argument we see appeals to both truth and trust, without sufficient *reason* for either. Constitutional arguments do not even attempt to deal with the facts about the practice they seek to legitimate. Quite the contrary, they proceed by obscuring and marginalizing concerns – such as the indeterminacy of purposive reasoning, or the partiality of judicial perspective – which should be central to their analyses. Notwithstanding the pretensions of intellectual rigour and analytical depth, constitutional arguments are really just appeals for faith in the institution of judicial review and, correspondingly, obedience to the outcomes of that institution. They do not provide good reasons for the authority of judicial power.

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[255] M. Buber, *Two Types of Faith* (New York: Collier Books, 1951) at 7.